(25,153)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 391.

OSCAR J. WEEKS, DOING BUSINESS UNDER THE NAME OF O. J. WEEKS & CO., PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print
Caption ..... (omitted in printing)..	*a*	
Transcript of record from the district court of the United States for the southern district of New York (omitted in printing)	1	
Petition of Oscar J. Weeks for writ of error (omitted in printing)	1	
Order allowing writ of error..... (omitted in printing)..	4	
Writ of error..... (" ")..	5	
Information, fruit wild cherry..... (" ")..	8	
Bill of particulars, fruit wild cherry (omitted in printing)	13	
Information, special lemon.....	14	1
Motion to quash..... (omitted in printing)..	16	
Opinion overruling motion to quash (omitted in printing)	17	
Demurrer, fruit wild cherry..... (omitted in printing)..	22	
Demurrer, special lemon.....	25	2
Opinion disallowing demurrer..... (omitted in printing)..	27	
Extract from minutes—Docket entries, sentence, &c.....	31	3
Bill of exceptions.....	32	4
Appearances	32	4
Motion to consolidate cases, &c. (omitted in printing)..	32	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 16, 1916.

	Original.	Print
Colloquy between court and counsel, &c. (omitted in printing)	33	
Government's Exhibit 1—Label, special lemon	36	4
Testimony of Thomas S. Lewis	36	5
Government's Exhibit 2—Invoice, January 25, 1915	40	7
Testimony of Clark T. Smith	41	7
Charles Fink	42	8
Cleon O. Dodge	43	9
Henry Alexander (omitted in printing)	48	
Government's Exhibit 4—Invoice, dated May 10, 1911 (omitted in printing)	50	
Government's Exhibit 5—Label, fruit, wild cherry compound (omitted in printing)	51	
Defendants' Exhibit A—Letter, Alexander to Weeks & Co., May 3, 1911 (omitted in printing)	55	
Government's Exhibit 6—Check to Weeks & Co. for $6.50, July 13, 1911 (omitted in printing)	59	
Testimony of Rodney A. Griffin (omitted in printing)	59	
Testimony of Albert F. Seeker (omitted in printing)	60	
Motion to dismiss (omitted in printing)	64	
Testimony of Albert F. Seeker (recalled) (omitted in printing)	67	
Testimony of Oscar J. Weeks	70	12
Dr. Joseph A. Deghuee	74	14
James C. Weger (omitted in printing)	80	
Charge	84	17
Requests to charge	89	20
Verdict	93	20
Settlement and judge's certificate to bill of exceptions (omitted in printing)	94	
Assignment of errors	95	21
Statement of undertaking on appeal (omitted in printing)	105	
Citation (" ")	106	
Stipulation as to record (" ")	107	
Clerk's certificate (" ")	108	
Opinion, Lacombe, C. J.	109	22
Judgment	116	27
Memorandum vote denying petition for rehearing (omitted in printing)	118	
Petition for rehearing (omitted in printing)	118	
Order denying petition for rehearing (" ")	130	
Clerk's certificate (" ")	131	
Writ of certiorari and return	132	27
Statement of points on which petitioner intends to rely and proof of service of same	138	29
Designation by respondent of additional parts of the record to be printed	143	31

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1-14 *Information.*

Special Lemon.

United States District Court, Southern District of New York.

[Docket 5-366.]

Of the April Term, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Now, comes Henry A. Wise, United States Attorney for the Southern District of New York, leave having been first had and obtained, and respectfully informs this Court, that heretofore, on January 25, 1912, at the Southern District of New York and within the jurisdiction of this Court, Oscar J. Weeks, doing business under the name and style of O. J. Weeks & Co., did ship and deliver for shipment from the City of New York, State of New York, to the City of Atlanta, State of Georgia, consigned to T. S. Lewis & Company, Incorporated, a certain article of food labeled as follows:

"Special Lemon.

"Lemon Terpene and Citral—O. J. Weeks & Co., New York, N. Y. U. S. Serial Number 2049. Guaranteed under the Food & Drugs Act, June 30, 1906."

which said article shipped as aforesaid was misbranded in that the aforesaid article bore the statement "special lemon" regarding the said article and the ingredients and substances contained therein, which was false and misleading in that the statement would indicate that the said article was a product derived from lemon; whereas, in truth and in fact, the said article was not a product derived from lemon, but was a mixture containing alcohol and citral de-
15 rived from lemon grass, and was, in fact, an imitation of lemon oil.

And the said article was further misbranded in that it was labeled as aforesaid so as to deceive and mislead the purchaser thereof, in that the said label would indicate that the said article was a product derived from lemon, whereas, in truth and in fact, the said article was a product containing alcohol and citral derived from lemon grass, and was, in fact, an imitation of lemon oil; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Second Count.

And the said Henry A. Wise, in manner and form aforesaid, further informs this Court, that heretofore, on January 25, 1912, at

Southern District of New York and within the jurisdiction of this Court, Oscar J. Weeks, doing business under the name and style of O. J. Weeks & Co., did ship and deliver for shipment from the City of New York, State of New York, to the City of Atlanta, State of Georgia, consigned to T. S. Lewis & Company, Incorporated, a certain article of food labeled as follows:

"Special Lemon.

"Lemon Terpene and Citral—O. J. Weeks & Co., New York, N. Y. U. S. Serial Number 2049. Guaranteed under the Food & Drugs Act, June 30, 1906."

which said article shipped as aforesaid was misbranded in that it was an imitation of lemon oil and was offered for sale by the said Oscar J. Weeks under the distinctive name of another article, to wit, a product derived from lemon, whereas, in truth and
16-24 in fact, the said article was not a product derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass, and was, in fact, an imitation of a product derived from lemon; against the peace of the United States and their dignity and contrary to the form of the statute in such case made and provided.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for the United States.

(Endorsed:) United States District Court. Filed April 22, 1913. Southern District of New York. Judgment entered: October 24, 1913, 12:30 P. M.

* * * * * * *

25 *Demurrer.*

Special Lemon.

UNITED STATES OF AMERICA,
Southern District of New York:

In the District Court Thereof, June Term, A. D. 1912.

No. —.

UNITED STATES OF AMERICA
v.
OSCAR J. WEEKS, Doing Business under the Name and Style of O. J. Weeks & Company.

And now comes into court the defendant, Oscar J. Weeks, by his attorney, Walter Jeffreys Carlin, and has heard the said information and each count thereof read, and as to each count of said information says:

That the United States of America ought not to further prosecute

him, the said defendant, touching the premises whereof he is by the said information, and each and every count thereof, severally accused, because he says, that the said information, and every count thereof severally, and the matters therein contained, are not sufficient in law to compel him, the said defendant, to answer or to plead to the same, and as to each count severally, this defendant says, that that count, and the matters therein contained, are not sufficient to compel him to answer or plead to the same, and this he is ready to verify.

And for specification of points under said general demurrer
26-30 and for further and additional grounds of demurrer to the said information, and to each and every count thereof severally; this defendant says:

1. That the said information and each count thereof is not supported by a verification or oath showing personal knowledge or probable cause.

2. That the counts of said information and each of them are insufficient and fail to charge an offense.

Wherefore, this defendant prays judgment of the Court that he may be hence dismissed and discharged of the matters and things alleged in the said information.

WALTER JEFFREYS CARLIN,
Attorney for Defendant.

I, Walter Jeffreys Carlin, attorney for the defendant, Oscar J. Weeks, in the above entitled cause, hereby certify that in my opinion the foregoing demurrer is well founded in point of law and that the same is not interposed for delay.

WALTER JEFFREYS CARLIN.

(Endorsed:) United States District Court, Southern District. Filed April 22nd, 1913.

* * * * * * *

31 *Extract from Minutes.*

UNITED STATES
v.
O. J. WEEKS & Co.

1912.
Filed Information Wild Cherry Case.
Oct. 14. Filed motion to quash.
28. Opinion, Mayer, J.
1913.
Apr. 22. Filed Information—Special Lemon Case.
22. " Demurrer both Special Lemon and Wild Cherry Case.
June 7. Opinion, Hand, J. Both Demurrers overruled.
26. Def't pleads not guilty to each information.
Oct. 16. Information 4/500, 5/366 & 5/416 Ordered consolidated.
16. Trial begun.

17. Trial concluded.
20. Defendant sentenced to pay $50— on each count in Special Lemon Case and $100.— on first information in Wild Cherry Case and $50.— on second information in Wild Cherry Case together with costs of prosecution.

32-35 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
v.
OSCAR J. WEEKS, Doing Business under the name and Style of O. J. Weeks & Company, Defendant.

This case was brought on for trial at a Trial Term of the United States District Court of the Southern District of New York, held in the United States Federal Building, in the City, County and State of New York, before the Hon. Wm. H. Hunt, United States District Judge, and a jury, on the 16th day of October, 1913, when the following proceedings were had and testimony taken:

Appearances:

H. Snowden Marshall, United States Attorney for the Government, Robert P. Stephenson, Assistant United States Attorney, of Counsel.
Walter Jeffreys Carlin, Attorney for the Defendant.

The jury is impaneled.

* * * * * * *

36 The jury was duly sworn.
Mr. Stephenson made an opening statement to the jury on behalf of the Government.
Mr. Stephenson: Counsel for the defendant says that it is stipulated that on the date alleged in the information, January 25, 1912, the defendant, Oscar J. Weeks, shipped from the State of New York, City of New York, to Atlanta, Georgia, consigned to T. S. Lewis, Incorporated, a certain article of food, which bore this label, which I will have marked Exhibit 1 in evidence.
Said label received in evidence as Government's Exhibit 1.

Special Lemon

Lemon Terpene and Citral

O. J. Weeks & Co., New York, N. Y.

U. S. Serial Number 2049

Guaranteed under the Food and Drugs Act, June 30th, 1906.

THOMAS S. LEWIS, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Stephenson:

I live in Atlanta, Georgia, and am in the wholesale cracker manufacturing business, conducted by a corporation by the name of T. S. Lewis Co. We use oil of lemon for flavoring in our baking business. On January —, 1911, a salesman for O. J. Weeks and Co., named Mr. Fink, called at our office.

37 Q. Now, please state what occurred when that salesman came there.

Mr. Carlin: I object as irrelevant, and absolutely incompetent. The shipment is admitted. What the salesman said has nothing to do with the question of the misbranding of this product, and that is the only question alleged.

Mr. Stephenson: This evidence is offered under the second count of this information. I want to show that it was offered for sale by the defendant under that name.

Mr. Carlin: We contend that the label cannot be contradicted. The label controls as to this shipment. This man did not ship what his salesman said. He shipped a bottle labeled as follows—and if the salesman said it was vanilla extract, it would not make a bit of difference.

The Court: Why would not the doctrine of agency have some relevancy. Why may it not have?

Mr. Carlin: Because the charge is misbranding, and the misbranding is alleged, under the product labeled. We contend that a conversation cannot contradict the absolute labeling of a product.

The Court: The Government is limited simply as to whether or not the label was a misbranding.

Mr. Carlin: Yes, sir.

The Court: I am not sure of it, but my notion is that the Government is confined to a clear endeavor to prove that the label was in fact and in truth false.

Mr. Stephenson: This evidence as I said, is limited to the second count of the information.

38 The Court: I am not altogether satisfied myself, in the brief consideration I am able to give, that that testimony is relevant. It may be admitted subject to an exception of the defendant. For the purpose of having the point preserved, if you are

going to offer this evidence now, the Court will admit it over the objection of the defendant to each and every question that may be propounded, and the exception preserved, as fully interposed after the interrogatory as propounded.

Q. Now, Mr. Lewis, what did Mr. Fink tell you regarding the article he proposed to sell you?

A. Well, he told me, it was pure oil, just as good as Sanderson's oil.

Q. Pure—what kind of oil?

A. Lemon oil.

Q. Do you know what the general understanding in the trade of Sanderson's grade lemon oil is?

A. Well, from hearsay, yes.

Q. What else did he say—anything about the price?

A. Well, he gave me a price on it.

Q. How much?

A. 90 cents.

Q. Was that less than the current price of pure oil of lemon?

A. Yes, sir, a good deal less.

Q. Did you speak to him about that?

A. Yes, sir. The difference was so much, that it led me to question him about the grade of the oil.

Q. What occurred then?

A. And he assured me that it was pure oil; referred to it as a second pressing, but that it would go just as far as the regular grade of lemon oil.

Q. Then what did you do?

A. I bought some of him.

Q. That is, your ordered some, did you?

A. Yes, sir.

Q. How much did you order?

A. Two coppers, I think.

39 Q. How much in each copper?

A. Twenty-five pounds.

Q. And were those coppers later received by you?

A. Yes, sir.

Q. From what railroad company did you receive them?

A. The Central of Georgia.

Q. Now, is this the invoice you received for that order you gave (showing witness paper)?

A. Yes, sir.

Mr. Stephenson: I offer it in evidence.

Mr. Carlin: The Court will note my objection to the invoice as well.

The Court: Yes.

Mr. Stephenson: Is your objection to the materiality?

Mr. Carlin: On all the grounds stated. We will admit that that is the defendant's invoice—no question of proof in regard to that. but outside of that we object to it.

Said invoice received in evidence as Government's Exhibit 2.

40 GOVERNMENT'S EXHIBIT 2.

All claims to be made within five days of receipt of goods. Bills not paid at maturity will be drawn for at three days' sight.

O. J. WEEKS & CO.,
Manufacturers of Specialties for Bakers, Confectioners and Ice Cream Makers.

216 Franklin Street.

NEW YORK, N. Y., January 25, 1912.

Sold to T. S. Lewis Co., Atlanta, Ga.

Terms: 30 Days Net, No Discount Less 1 per cent, if paid within ten days of date of bill.

2-25 lb. coppers Special Lemon @ 90c	45	00
1% discount		45
	44	55

O. K.
F. V. L. 2/1/12
O. S. S. Co.—176—Fink
Vt. Cent. Ry. 1 05.

Shipped via
Positively No Discount Allowed after, Feb. 4, 1912.
These goods are sold F. O. B. New York City.
No freight allowed.

Exception by defendant.

I paid the invoice of the O. J. Weeks Co. I sold some of this lemon oil to an inspector of the Department of Agriculture. I do not remember how much it was. It was not a whole copper. He got me to get out this oil from a copper that had not been
41 opened, and in his presence I took out a sample of it, I forget how much now, and he took the label that was on the copper, and the copper both. That is the label, Exhibit 1, that was on the copper.

Cross-examination by Mr. Carlin:

It is not true that at the time I bought this special lemon for 90 cents the current price of lemon oil was $1.45. It was $1.00 or $1.25, I am very positive of that.

CLARK T. SMITH, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Stephenson:

I am a Food and Drug Inspector, of the United States Department of Agriculture. I collected a sample from Mr. Lewis, who

just preceded me on the stand at Atlanta, Ga. Exhibit 1 was on the copper. We had a sample brought out and I wrote my name on it. I put the sample under seal, and shipped it to the Bureau of Chemistry at Washington, and that is the sample. The sample has my seal, the sample number and the date and my signature and my initials also on this white slip here. When I sent the sample I put a seal over the cork. I put number 14,195D, on the seal. That seal has been broken, and a portion of it removed. The contents of the package I shipped to Washington, was the same as the contents of the original copper from Mr. Lewis' possession, and was shipped to Washington in the same condition.

Mr. Stephenson offered the bottle for identification.
Marked Government's Exhibit 3 for identification.

42 CHARLES FINK, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

I was a salesman for the defendant up to last April. I called on Mr. Lewis, Atlanta, Ga. Before I left Mr. Weeks' place, I did not have a talk with him, never had a talk with him in regard to any business, after I left him, that was all there was to it, I left. Mr. Weeks employs me, O. J. Weeks & Co. employed me; told me to go out and sell goods. Mr. Weeks was the person who employed me, the defendant here. He told me to sell goods and don't misrepresent them. He told me to sell everything pertaining to his line of business, specials. Among other things he told me to sell special lemon. He gave me a sample of special lemon and pure lemon oil. I had about a dozen of samples. When I saw Mr. Lewis I showed him the sample of special lemon, and it was labeled special lemon. That is the only label I had on the bottle—the sample bottle.

Cross-examination by Mr. Carlin:

I am not employed by Mr. Weeks now. I feel friendly toward him and toward any man whether I leave him or not. I showed Mr. Lewis, the gentleman who testified, the special lemon. I went in and saw Mr. Lewis; I saw him before. I had then known him about seven years. I had this special lemon in a bottle; always kept it separate. When I went on the road Mr. Weeks told me not to sell this as pure lemon oil but as special lemon. I showed it to him. For twenty-five years I have made a test to my own satisfaction. I never asked Mr. Weeks or any other man how it would work out. The stuff was there. I tested it up against the pure stuff that comes from Italy. After my observation I found that the lemon oil
43 was special lemon that is made and may be mixed. If it contains the flavor and held from keeping getting nasty is much better than the pure lemon oil. I told that to Mr. Lewis and I think I said that in accordance with the market the way it is to-day if you use this special lemon, give it a trial as I have, you can save about 40c. to 60c. a pound upon it. They are selling that at 90c. The pure oil ran at that time from $1.25 to $1.40. Mr. Lewis said, "All right, I will take a chance on a couple of coppers." I positively never told Mr. Lewis that the special lemon I was offering him was

pure lemon oil. I did not say it was lemon oil. I never offered it or represented it as anything else but special lemon. I told Mr. Lewis the lemon was just as good as the pure oil and he wanted me come in with this special. I never sold it as pure lemon oil. I told him it was absolutely as good as Sanderson, as W. J. Bush or any on the market, to my observation. I did not care what he thought after I made the sale. I wanted to make the sale and did make it.

Redirect examination by Mr. Stephenson:

I might have told Mr. Lewis that the second pressing was practically the best pressing; that we get the best oil out of it. The second pressing goes into cheap goods.

CLEON O. DODGE, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Stephenson:

I am assistant chemist in the Department of Agriculture in Washington and have been since February, 1907. During that time my work has been on extracts and essential oils. I have seen Government Exhibit 3 for identification before. There is my name
44 upon it. When it came to me the seal put on by Mr. Smith was unbroken. I broke the seal, opened the bottle and analyzed the contents. I found that it contained 7.4 per cent. citral. It contained about 1.2 per cent. of alcohol. It had a specific gravity of .8554, with an index fraction of 10 per cent. radial under vacuum; distillation was 1.4890.

Q. Is it lemon oil?
A. No, sir.

Objected to.

Q. Is it special lemon?

Objected to.
The Court: I think an expert can answer a question like that.
Exception by defendant.

I have been handling extracts practically all the time I have been with the Bureau. I am familiar with extracts. In my opinion that article is not special lemon.

Cross-examination by Mr. Carlin:

No author or authority lays down what special lemon is. I have heard the term before I saw it on the bottle. I have seen it on different bottles of oil. To my mind special means something extra—higher quality perhaps rather than extra. This is what I base my definition on. Special means that this product as in a peculiar and distinguishing degree some characteristic or characteristics. These characteristics are found in the contents. I did not see the label. This is the only label that I saw. The label defines the special char-

acteristics to a limited extent. There is alcohol in lemon extract. I said in my mind, special means higher quality. I think that is the general impression conveyed by the word special. I cannot
45 name any dictionary or any authority in the English language that so defines the word special. My opinion is merely the impression that it conveys to my mind.

Redirect examination by Mr. Stephenson:

I found citral in this product. The citral is derived from lemon grass. Citral is derived from a number of other things. Lemon grass is a grass that grows in the East Indies. It is a grass that the oil is obtained from, depression. The word special is frequently used in the same sense as concentrated. That is, it is something above the general run. I mean better.

Cross-examination by Mr. Carlin:

I have never been in the flavoring extract business. I have never handled extracts commercially. I know something about trade terms and trade customs. I acquired my knowledge in contact with the business; from seeing cases as they passed through the department. My knowledge is not merely what the department officials have said. I cannot name one extract manufacturer that ever so defined special. I have seen the extract from probably, perhaps one hundred people there. I do not remember the special labels. I defined special as having a peculiar characteristic. That word special attracts attention to the fact that this lemon has a peculiar characteristic. The peculiar characteristic is not plainly set forth on the label. The difference is that it does not explain that that is an imitation. I say it was an imitation. It does not say on the label that it is an imitation. I would say it from my analysis. It does contain lemon terpene and it does contain citral and these are the chief components of it.

By Mr. Stephenson: The product differs from lemon oil.

46 Q. Does lemon oil contain other constituents which add to its flavor and make up this flavor, and which are not contained in this product?

Mr. Carlin: I object to the question in regard to flavor.

The Court: I think the jury would like to hear it. I would like to hear what are the distinguishing features of ordinary lemon oil and this particular lemon—this particular product in this bottle, and it would add at least a better understanding in what the misbrandings are.

Mr. Carlin: I object to him picking out any particular lemon and discussing it.

The Court: I think as an expert he can do that. I will give him that latitude.

Exception by defendant.

Q. What is the difference between the product which you found upon analysis here and lemon oil?

A. Why, lemon oil contains approximately 90 per cent. of terpene and about 5 per cent. of citral, and the remaining 5 per cent. is made up of a large number of esters, of which at least 10 has been identified, and there are several more which have not been confirmed.

Q. And do these different esters add to and make up the flavor of lemon oil?

A. Yes, sir.

Q. As well as the citral?

A. Yes, sir.

Q. Now, in this product, if I understood you right, all these esters are absent, is that right?

A. Not all of them; some of them would have been removed, but not all of them.

By a juror:

Q. Is there any harmful ingredients in that special preparation?

A. No, not that I found.

47–68 By Mr. Carlin:

Lemon extract is a solution of lemon oil in alcohol; requires about 80 per cent. of alcohol and 5 per cent. or more of lemon oil. In making my interpretation I looked at the sample. I saw that it had an oily consistency, therefore, I considered that it was a special. If you are going to follow the reading a special oil—In making my proposition of this being special lemon I added in my own mind that it was a special lemon oil. That is what I understood. Not a special lemon flavor and not a special lemon extract. To base my opinion I have to add one particular word "oil" to the label.

By Mr. Stephenson:

Q. Is this a special lemon flavor?

Objected to; objection overruled; exception by defendant.

A. No, sir.

It is not a special lemon extract; it is not a special lemon oil. None of these special element- had what I place at the end.

By Mr. Carlin:

It is not a special lemon terpene and citral. It contains lemon terpene and citral and those are the chief ingredients.

Mr. Stephenson: That is all of the evidence on this case, your Honor. I offer it on the other.

Government Rests.

* * * * * * *

69 Mr. Carlin: If the Court please, I do not think I need go over that long motion—deem it made, I think.

The Court: Yes.

Mr. Carlin: I have not quite completed my motion on the second point that we are considering—the lemon case, when we took a recess.

* * * * * * *

70 OSCAR J. WEEKS, the defendant, called as a witness on his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Carlin:

My business is making specialties for bakers, confectioners and ice cream manufacturers. I manufacture special lemon.

Q. Who prepared the label for that?

Mr. Stephenson: I object.

The Court: What is the purpose of that?

Mr. Carlin: Going to show the absolute good faith of the defendant.

The Court: I do not think that would be material.

Exception by defendant.

I have been in the extract business practically the best part of my life. I designed the product, special lemon; that is, the composition of it. There is a meaning in the trade for the word "special lemon." It means something special of its kind. There was something special of its kind as to this special lemon. This was intended for bakers to use in their bakery products, because bakery products are subject to heat in the oven of say between 300 and 500 degrees Fahrenheit, and unless you had something strong, the best part of the flavor would go up the chimney flue. The main flavoring element of lemon is citral. Lemon oil, according to the use of the pharmacopœia, is about 4 per cent. citral. Ours contained over 7 per cent. of citral to strengthen it so that the flavor would remain in the goods. It was made especially for that trade. We never sold it to confectioners because it would make the confectionery taste bitter.

71 I could not say exactly how long I have been selling this product, but I have been selling it for several years. Yes, sir, for several years before I made this shipment to Atlanta, Ga. I have shipped it to various sections of the country. I cannot state to how many different states, but we sold it generally. We sold it to cracker bakers generally. We have never had any complaints from any manufacturer or from any person that he was misled or deceived by the label. There was something else special as to this special lemon besides its being for a special purpose. It was special as compared with pure lemon oil—as to its citral contents, and it was much cheaper in price. At that time Sanderson's lemon oil, which was quoted here, which commands higher prices than the average lemon oil, was about $1.40 a pound. The average price would depend on how much was purchased, but not less than $1.25. I should not think it would be lower. We have shipped the wild cherry compound extensively. We have never had any complaint from any manufacturer or from any other person in regard to it and no one ever claimed that he was deceived or misled by the label.

Cross-examination by Mr. Stephenson:

I could not say just to the year that we have been selling special lemon but I should say, at a guess, about four, or maybe five years. When we first sold it we used the same label that we used up to the time that we made this shipment to Lewis. I could not say what we meant by the label just at the beginning because we did not make it just that way. We label the goods as we make them. I do not know how we made it at the beginning. That is to say I don't remember. I have no recollection on it for the moment. My best recollection would be that we made it the same way. If we
72 made it that way we labeled it that way. I would not label it special lemon without anything else. I should describe it—describe the contents. I would do that because special lemon would not be a label in my estimation that would cover—it would not be a true label—it would not be a true label in my estimation unless it had some of the contents described. The words, "Special Lemon" only on the label would be misleading. We did not give a sample to Mr. Fink with the words just "Special Lemon" on it. I do not believe that he testified that that was all that was on the label. The label that we gave him was just exactly like that posted on a one-ounce homeopathic vial. I do not think that the invoice, 225 Copper Special Lemon was misleading because we do not put on the invoice all the contents as I think we should on the goods. If, for instance, we put on the shipment all the contents of that shipment I don't think it is necessary to put that on the invoice. It is only part of it to say that I told Mr. Fink that this was special lemon, not pure lemon oil which you can sell. I handed him a sample of special lemon fully labeled. I don't know as I told him the contents. He was able to read that. I cannot account for any reason why Mr. Fink did not tell Mr. Lewis what the contents were. I cannot account for what Mr. Fink would say down in Atlanta, Ga., to a customer. I cannot say what Mr. Fink told the customer down at Atlanta, Georgia. I don't know how Mr. Fink got it in his head that it was a second pressing. I do not think he testified that he said that. I remember that Mr. Lewis said that Mr. Fink told him that but I should judge from the testimony of Mr. Fink that he did not say so. I remember. Mr. Fink saying he would not say whether he said it or not. I also take into consideration that Mr.
73 Fink was a salesman. He wants to sell more goods to Mr. Lewis. We sell the product at 90 cents a pound. It is made from citral and terpene from lemon oil. The citral we buy. I think the citral is from lemon grass. Well, I only think it is because I buy it under contract and that contract has just the one word, citral. I did not invent the use of the word special. I think the dictionary covers that word special. I do not believe I began its use in the trade. I may have used it as regards lemon. Others use it. I was just in a restaurant and saw, "Special for today." No, they were just special articles that they were selling this day. It was a special lemon that we were selling against the pure lemon oil, which we also sell. Pure lemon oil is not special, it is regular. This

would be irregular. I did not call it irregular lemon because I chose the word special. Another element of this specialty is that it is special in price. When I put that label on I meant a special lemon, special price—special everything connected with it. It is special in price as distinguished from the price of pure lemon oil. It is specially low-priced. We were selling this at a specially low price. One of the specials that I saw on the bill of fare was onion soup. I did not say that I ordered it. It may be that the soup was made out of artificial onion flavoring because there is such a thing as artificial onion flavoring. No, I did not think it was—I did not analyze that far. I did not think it was specially good quality of onion soup.

* * * * * * *

74 Dr. JOSEPH A. DEGHUEE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Carlin:

I am a consulting chemist. I am a graduate of Columbia
75 University, Class of 1890. I studied chemistry in the Scientific School at Columbia University and took the degree of Bachelor of Philosophy at the end of my regular course. I took a post graduate course, taking the degree of Master of Arts and Doctor of Philosophy also in Chemistry. Immediately after leaving college I was instructor in physiological chemistry and toxicology in the College of Physicians and Surgeons. Physiological chemistry is the chemistry of the processes of the animal body, and animal organs, and toxicology is the chemistry of poisons. I also acted as private assistant to Professor Charles A. Chandler, Sr., professor at Columbia College at that time; assisted him chiefly in his sanitary work and food examination. After that, in 1896, I became chemist to the New York City Department of Health, first as assistant chemist, and for two years I was chief chemist of the department. In 1904, I associated myself with Dr. Lederle, and founded the Lederle Laboratories, of which I am at the present time President and Director of it in chemistry. In all that time and during my whole career since graduation, I made a special study of food chemistry and sanitation. As chemist of the Board of Health and as consulting chemist I have had frequent questions in regard to food. When I was with the Board of Health our examinations were chiefly of the food sold in New York City. That was the chief business of the chemist. I did that work for eight years. As a consulting chemist I have specialized in foods. My chief work has been in connection with foods, the protection of food; largely, in late years, on the question of industrial food manufacture. That relates to all kinds of foods including flavoring extracts and drinks. I have heard the word special used in regard to food. The word "special" is used in
connection with foods in the same way that it is used in con-
76 nection with other matters. It simply means a material which is out of the ordinary; something which either is peculiar in its character or made for a particular purpose or not, or

a regular price list; printed on a special train—a train that is not on the regular time table. The word "special" conveys a particular meaning to persons versed in the chemistry of foods and their examination. As I said, it means out of the ordinary run.

Cross-examination by Mr. Stephenson:

I would not consider a train which was several hours late a special train; not if it was a regular time table train running behind time. I did not say everything out of the ordinary run was special. I said special was something out of the ordinary. My opinion of the word, "special" is not that of a layman. It is partly that, yes. Of course, I know the meaning of the word special, but knowing the ordinary English language is an element. I also know the use of the word special as used in industry, about manufacturing, by scientific men. It is difficult to recall specific instances. The term is used very commonly. A man buys a special chemical which is made particularly for him. Well, the one that comes to my mind for the moment is, for instance, a special denatured alcohol to be used in—denatured alcohol for particular manufacturing purposes. This special denatured alcohol is an alcohol which is denatured with a chemical or material which does not affect the product in which the denatured alcohol is to be used. It is denatured alcohol. It belongs to a class of denatured alcohol. This special lemon belongs to a class of lemons, yes, with lemon flavors. I don't know just what an imitation denatural alcohol would be. I never heard of such a thing so
I cannot make any comparison. I should say it is not an
77 imitation denatural alcohol. Denatural alcohol is defined
as a certain thing. The special denatural alcohol belongs to a class of denatural alcohol. Denatural alcohols are not all alike. The trouble with your term denatural alcohol is that it is not a chemical product. This denatural alcohol is a thing which is defined under the law. This is a thing which necessarily implies legal authority. Otherwise it is not a denatural alcohol. It is a denatural alcohol. It applies to those requirements and the special is denatural if it complies with the requirements. I am connected with the Lederle Laboratories. Yes, I should say I have made several examinations on food. I have examined meat on occasions. I have made thousands of examinations. I would not want to say that I was infallible and never made a mistake. I have testified in a good many cases; testified as a toxicologist and as an expert physiological chemist and an expert examiner of foods. I do not think I am testifying as an expert on the trade meaning of special.

Redirect examination by Mr. Carlin:

The general term denatural alcohol is applied to grain alcohol which has had something added to it, which makes it unfit for drinking purposes. And also the character of the material must be such so that the alcohol cannot be refined again easily, and make it fit for drinking purposes. It must be done with the special permission of the Government, if a special denatural alcohol is had, for

that reason. Denatural alcohol means that something has been placed in the article to spoil it for drinking purposes. Special denatural alcohol would mean that a particular thing had been dumped into it so that it would not intertere with the product that a certain manufacturer might want to make from it.

78 By juror No. 1:

We do not take pure alcohol and denature it. It is originally a low grade of grain alcohol, but it would be pure grain alcohol originally and the denatural material which is going to make it unfit for drinking purposes that is added to the alcohol. In the original state it would be denatural. It would, in a sense, be fit for drinking purposes.

By another juror:

Special lemon, to my mind, would be a lemon grade of some kind which was designed for a particular purpose. It would not necessarily have real lemon oil in it for the reason that it would have the general characteristics of lemon. It would have the odor and taste of lemon. It would call for and resemble lemon. It is not an imitation. It contains some part lemon.

By Mr. Carlin:

If, instead of the product being labeled special lemon it was labeled "special lemon," "lemon terpene and citral," I would say it was just what the mixture says it was, a mixture of terpene and citral, and if it was found on analysis to contain that I would certainly say that the label was proper.

By Mr. Stephenson:

If the label only had "special lemon" on it the label would not be complete information and there is a possibility that it might be misleading to the ordinary purchaser.

By the Court:

Lemon terpenes are the oily part—the hydro-carbon oils of the lemon, of the lemon peels. Ordinarily lemon oil is chiefly composed of lemon terpenes. The lemon oil also contains citral which gives the aroma largely to the lemon oil and also contains other
79 ingredients so that the lemon terpenes are the oily part of the lemon peel.

By Mr. Stephenson:

Lemon terpenes is the commercial element. Terpenes are derived from lemon oil. They are commonly prepared by shaking the lemon oil or cutting the lemon oil with alcohol. In that process the citral and the other flavoring ingredients to a large extent are removed from the lemon oil and the lemon terpenes remain. The lemon terpenes are a by-product from the manufacture of lemon flavor; all the so-called terpene, that is lemon flavor. What we get out of the alcohol is not what are known as lemon flavors and lemon

extracts. Under the regulations of the United States Department of Agriculture a lemon extract must contain at least five per cent of these lemon terpenes. They must be specially labeled, "terpeneless lemon extract," to indicate that the terpene is not present. It is also used as special flavor, in cases where the oily part of the lemon would be objectionable—where the lemon extract is to be mixed with water for instance, it would, with the lemon oil, produce a terpidity. These lemon terpenes are used because they contain no oil and consequently do not produce a terpidity. Terpenes are a by-product in the manufacture of terpeneless lemon extract and the by-product has very little flavor. It is an oil, yes. It has the general characteristic, that is oil. In the special lemon product the element which gives it flavor is the citral. Terpenes give a body to it and have a food value, but add very little to the flavoring part of it.

By Mr. Carlin:

In ordinary lemon extracts terpenes are present.

Defendant Rests.

80–83 ALBERT F. SEEKER, recalled on behalf of the Government in rebuttal.

Direct examination by Mr. Stephenson:

Government Exhibit 7, which I analyzed, did not contain any infusion of the bark of wild cherry.

Cross-examination by Mr. Carlin:

I could not find any wild cherry in the product. If it had less than ten (10) per cent of wild cherry juice my examination would not show it at all. If it had up to ten (10) per cent of juice my examination would not have shown it. As far as my test is concerned it may have contained 10 per cent of the juice. I say it contains no infusion of the tank because I obtained an absolutely negative test for tanum. The bark contains considerable tanum when extracted by the water if the infusion of the bark had been there.

Government rests.

* * * * * * *

84 *Charge.*

The Court (HUNT, *J.*): Gentlemen: Cases of this character are of course important to the interests of the Government and important to the interests of men engaged in business. The Government a. you know has, within the past few years, taken up and given very great consideration through Congress to legislation which is intended to prevent the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines or liquors, and for regulating traffic in such things, and in

the execution of its purpose has passed statutes wherein are found those particular sections under which the indictment now in this case before you has to be considered.

On the other hand, as I have intimated, there is no aim on the part of the Government to interfere with legitimate business operations carried on in the manufacture of such products as may be used in the way of drugs, food or medicine and liquors, unless there is a clear violation of the statutes.

While there are several counts in these indictments, the case is simplified by eliminating the more formal allegations and condensing the substance of the charges in this way.

Let us take the so-called special lemon case. The first count in the indictment in that case charges that the article was misbranded, in that the statement "special lemon" was false and misleading, in that it would indicate that the article was a product derived from lemon, whereas, it is charged, that the article was not a product derived from lemon, but was a mixture containing alcohol and citral, derived from lemon grass, and was in fact an imitation of lemon oil.

85 The charge also is that it was misbranded so as to mislead and deceive, in that the label, which is in evidence before you, would indicate that it was a product derived from lemon, whereas the Government says it was a product containing alcohol and citral, derived from lemon grass, and was in fact an imitation of lemon oil. That is the first count.

The second count in the special lemon case charges that the article labeled "special lemon," as indicated in the label which is introduced in evidence, was misbranded, in that it was an imitation of lemon oil, and was offered for sale under the distinctive name of another article, namely, a product derived from lemon, whereas it was not a product derived from lemon, but was a mixture containing alcohol and citral, derived from lemon grass, and was an imitation of a product derived from lemon.

Next, we turn to the law. The indictment uses the word "misbranded" as Congress has defined misbranded. The statute it shall apply to all articles of food or other articles which enter into the composition of food, if the package or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or Country in which it is manufactured or produced.

Later on it says, "That for the purposes of this act an article shall also be deemed to be misbranded if it be an imitation of or offered for sale under the name of another article."

Now, take that brand, label I mean, as it is offered in evidence (you will be permitted to take it to your jury room), and ask yourselves whether you are satisfied that it was a misbrand,

86 by its bearing any statement or device or design which was false or misleading in any particular. Was there an imita-

tation, as charged in the indictment, or was it offered for sale under the distinctive name of another article than it really was.

You have heard the experts on behalf of the Government and in behalf of the defendant. There is some contradiction of testimony between them as to the composition of the elements which entered into this article. I will not endeavor to recapitulate it. It is somewhat technical in its nature. If you desire to have any of it read, I will ask the stenographer to read it to you, in case you do not recall what anyone said. But the question resolves itself into whether or not as offered, it was misleading, and was a misrepresentation, and would ordinarily deceive a purchaser to whom it was offered.

* * * * * * *

87 In both of these cases, if the label only conveyed ordinarily to the purchaser that which was within the bottle, then the defendant should not be convicted.

If it was misleading and intended to mislead, if it was misbranded as already explained to you, as I have read the statute, and you are satisfied that it was misbranded, was labeled falsely, then you should convict.

The defendant of course is presumed to be innocent. The usual rules apply here that do in all criminal cases. The Government undertakes to satisfy you of his guilt, and the proof must be such as convinces you in a way where you would be willing to act in your most grave and important concerns of life.

88 If there is any particular bit of the testimony, as I have said before, that you would like to have read, you are at liberty to call for it. I say that in this case, because it is of a technical character, and if I endeavored to recapitulate it myself, as detailed by the chemists, I would feel that I should ask the stenographer to go over it, lest my recollection be imperfect.

You have the testimony as to what entered into those respective articles; whether or not there was wild cherry, whether or not it was in such an insignificant amount, or such a significant amount as to remove or to prove the charge of misleading as made in the indictment:

What is the meaning of the word used in the lemon case, on the label? I will read that to you. "Special lemon, lemon terpene and citral." We have had some gentlemen tell us here what their ideas were as to what the words "special" means. The essential point is to remember the whole thing "special lemon, lemon terpene and citral."

Ordinarily, special would mean, I should say, something with a particular characteristic out, perhaps, of the ordinary. "Special lemon"—the word lemon appears there. Why was that used? What was its purpose? And followed by "lemon terpene and citral."

You have heard the definition of what terpenes are. I do not know but that I am correct in saying that they may be regarded as perhaps a by-product derived from the lemon rind. Am I correct in

that statement? Generally citral is, I think, conceded to be a lemon grass product; lemon grass.

I will give you the indictments. When you have reached a conclusion, you will by your foreman announce what it is.

89 You may convict upon any of the counts submitted or you may acquit under certain ones and convict under others, or you may acquit under all, as you think the evidence justifies.

* * * * * * *

Mr. Carlin: I respectfully ask the Court to charge that they must consider in this label, not only the words "special lemon" but also the words "lemon terpene and citral."

The Court: I have so charged.

Mr. Carlin: I ask the Court to charge, that if they find that this product consisted of lemons, terpene and citral, they must acquit the defendant.

Request denied; exception by defendant.

Mr. Carlin: I respectfully ask the Court to charge that the jury can only consider the statement on the label, and cannot consider the testimony in regard to the conversation had by a salesman in Atlanta.

90-92 The Court: That is declined. I will, however, tell the jury that they must remember that while that testimony is admissible, it is only binding on the defendant, provided they are satisfied beyond a reasonable doubt that they were made by his authority and direction. In order words to hold a principal liable in a criminal action, you must be satisfied that the representation was made by his authority.

* * * * * * *

93 & 94 UNITED STATES
v.
O. J. WEEKS.

NEW YORK, October 17, 1913—10:30 a. m.

Verdict finding the defendant guilty on information 4-500, information 5-366 and information 5-416.

Sentence deferred. Motions reserved.

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95 *Assignment of Errors.*

United States Circuit Court of Appeals for the Second Circuit.

OSCAR J. WEEKS, Doing Business under the Name of O. J. WEEKS & Co., Plaintiff-in-Error,
v.
THE UNITED STATES, Defendant-in-Error.

Action 1.

* * * * * * *

96 Sixth. The learned Court below erred in denying defendant's motion in arrest of judgment in the Special Lemon case.

Seventh. The learned Court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Now, please state what occurred when that salesman came there?" and in overruling defendant's objection thereto.

Eighth. The learned Court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Now, Mr. Lewis, what did Mr. Fink tell you regarding the article he proposed to sell you?" and in overruling defendant's objection thereto.

Ninth. The learned Court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Pure—what kind of oil?" and in overruling defendant's objection thereto.

Tenth. The learned Court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Do you know what the general understanding in the trade of Sanderson's grade lemon oil is?" and in overruling defendant's objection thereto.

Eleventh. The learned Court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. What else did he say—anything about the price?" and in overruling defendant's objection thereto.

Twelfth. The learned Court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q.

97 "How much?" and in overruling defendant's objection thereto.

Thirteenth. The learned Court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Was that less than the current price of pure oil of lemon?" and in overruling defendant's objection thereto.

Fourteenth. The learned Court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Did you speak to him about that?" and in overruling defendant's objection thereto.

Fifteenth. The learned Court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. What occurred then?" and in overruling defendant's objection thereto.

Sixteenth. The learned Court below erred in permitting the wit-

ness, Thomas S. Lewis, to answer the following question: "Q. Then what did you do?" and in overruling defendant's objection thereto.

Seventeenth. The learned Court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. That is, you ordered some, did you?" and in overruling defendant's objection thereto.

Eighteenth. The learned Court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Now, is this the invoice you received for that order you gave (showing witness paper)?" and in overruling defendant's objection thereto.

Nineteenth. The learned Court below erred in admitting in
98 evidence the invoice (Government's Exhibit 2), and in overruling defendant's objection thereto.

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99 Twenty-ninth. The learned Court below erred in refusing to give the following charge requested by the defendant in the Special Lemon case: "I ask the Court to charge that that first subdivision applies to and modifies the Section One which was read by the Court. They both must be considered together, in the law of misbranding."

* * * * * * *

Thirty-first. The learned Court below erred in refusing to
100-108 give the following charge requested by the defendant in the Special Lemon case: "I respectfully ask the Court to charge that the jury can only consider the statement on the label, and cannot consider the testimony in regard to the conversation had by a salesman in Atlanta."

* * * * * * *

109 United States Circuit Court of Appeals for the Second Circuit, October Term, 1914.

No. 243.

Argued April 21, 1915. Decided May 13, 1915.

(No. 1.)

OSCAR J. WEEKS, Doing Business as O. J. Weeks & Co., Plaintiff-in-error,

vs.

THE UNITED STATES, Defendant-in-error.

In Error to the District Court of the United States for the Southern District of New York.

Before Lacombe, Ward, and Rogers, Circuit Judges.

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, convicting

plaintiff-in-error, who was defendant below of violation of the Food and Drugs Act of June 30th, 1906. There were three informations and two counts under each. The first information dealt with an article of food called "Fruit Wild Cherry Compound." The first count of this information was quashed before trial. The second count charged shipment of such an article, which was misbranded, because it was labeled "Fruit Wild Cherry Compound," whereas it consisted chiefly of imitation wild cherry essence, artificially colored.

110 The second information, in its first count charged the shipping of the article which "was adulterated in that it was artificially colored with a coal tar dye in such manner as to simulate a fruit wild cherry and in a manner whereby its inferiority was concealed." The second count charged the selling and offering for sale of the article under the distinctive name of another article. The article and the label in all these counts were the same.

The third information in its *fruit* count charged the shipment of an article of food labeled; "Special Lemon. Lemon Terpene and Citral." This label was charged to be false and misleading because the statement in it would indicate that the article was a product derived from lemon, whereas it was in fact not a product derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass and was an imitation of lemon oil. The second count charged the offering of such article for sale under the distinctive name of another article to wit, a product derived from lemon.

Defendant was convicted under all five counts.

LACOMBE, *C. J.*:

The case calls for the construction of Secs. 7 and 8 of the Pure Food and Drugs Act. Prior sections forbid in general terms the manufacture and shipment in interstate commerce of any article of food or drugs which is adulterated or misbranded. Those two sections (7 and 8) undertake to define the words "adulterated" and "misbranded" as used in the Statute. Had they been phrased in general terms it might not be difficult to construe and apply them to the concrete facts of each case as they are developed on a trial. But the draughtsman apparently thought that the more words he used the more plainly would he express the meaning intended. Not unnaturally an opposite result has been accomplished. The sections are most difficult of construction, possibly the phrasing of some of their provisions may operate to defeat the object probably intended; but we cannnot re-write the sections, if amendment be needed

111 to make the Act effective that will be a matter for the consideration of Congress.

Considering now the charges as to the "Fruit Wild Cherry Compound," the labeling of which it is contended violates the provisions of Sec. 8, sub-head "In the case of food." The label indicates, we should suppose, to any intelligent mind that the article is a compound into which "Fruit Wild Cherry" has entered, at least in sufficient quantity fairly to warrant the use of these quoted words. The testimony of defendant's own witness shows that the article contains

absolutely no "Fruit Wild Cherry." It is therefore clearly within Sec. 8 Food subdivision, Paragraph Second because it is "so labeled as to mislead the purchaser" and also within Paragraph Fourth because its label bears "a statement regarding the ingredients or the substance contained therein, which statement (is) false or misleading in (the particular) that the compound contains Fruit Wild Cherry." If this were all one might leave the subject with a conviction that the statute, in its application to this case, had accomplished its apparent object. But the act contains an important proviso, apparently tacked on to the bill to protect various combinations on the market at the time. In order to appreciate the full force of this proviso, which concludes Sec. 8, it is here quoted:

"Provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitation, or
112 blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale; Provided, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only; And provided further, That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding."

Now there is not a scintilla of evidence in the case to show that defendant's article contains "any added poisonous or deleterious ingredients;" therefore it is covered by the proviso (second clause) because it is "labeled to plainly indicate that it is a compound" and the word "compound" is plainly stated on the package. In consequence it cannot, under the proviso, "be deemed to be misbranded."

In the second information the charge is brought under Sec. 7 of the Act which enumerates the conditions which will constitute adulteration of an article for the purposes of the Act. The charge is that "Fruit Wild Cherry Compound" was adulterated in that it was "artificially colored with a coal tar dye in such a manner as to simulate a true fruit wild cherry and in a manner whereby its inferiority was concealed." Section 7 contains this clause.

"Fourth. If it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed."

The shipment is the same as that covered by the first information. The label is the same "Fruit Wild Cherry Compound." Manifestly

the label does not state that the article is "Fruit Wild Cherry,"
but only that it is a compound, which contains fruit wild
113 cherry. Defendant's witness who was familiar with the
manufacture of the compound testified that they soak wild cherry bark in water, filter the infusion, dilute it with alcohol, add benzaldehyde or oil of bitter almonds, fruit juice of raspberries and some extract of orris and oil of rose. No fruit wild cherry enters into the compound. There was testimony from which the jury might find that the compound also contained a coal tar color known as amaranth; that genuine fruit wild cherry has a red color; that the compound described by defendant containing fluid extract of wild cherry bark would not have this color; and that the amaranth gave to the mixture the genuine color of wild cherry juice. The testimony seems to indicate that the bark infusion of wild cherry is inferior to the fruit juice and we should be inclined to sustain the verdict were it not for the proviso as to "compounds" above quoted.

That proviso is found at the close of Sec. 8 which section undertakes exhaustively to define "misbranding." Under ordinary rules of construction the operation of the proviso might be restricted to the section in which it appears, and it might be held not to qualify Sec. 7 which defines "adulterations." But the draughtsman of the Act has been careful not thus to restrict it, because the proviso begins: "That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases." Then follows the enumeration above set forth. The article in question is an article of food and the information does not charge, nor does the testimony show that there have been added to the compound "poisonous or deleterious ingredients."

The proviso therefore requires a reversal of the conviction under this count.

The second information deals with a different article, labeled "Special Lemon. Lemon Terpene and Citral." The first count charged that the article was misbranded, that the label was misleading in that the statement would indicate that the article was a product derived from lemon, whereas the product was not a prod-
uct derived from lemon, but was a mixture containing alcohol
114 and citral derived from lemon grass and an imitation of
lemon oil.

The article seems not to be covered by the proviso, because the word "compound" is not "plainly stated on the package in which it is offered for sale."

The question is, was the label false and misleading? It obviously indicated that the so-called "Special Lemon" was a compound of which Lemon Terpene and Citral were components. The words "Special Lemon" do not of course import that the article was "lemon," a word which in ordinary speech denotes the fruit of a well-known citrus tree. There is no testimony that this word standing by itself has any distinctive trade meaning; there are lemon oils, lemon extracts, lemon juice, lemon essence, etc. The use of the words "Special lemon" does not import any representation that the

article is a variety of lemon oil. The testimony shows that lemon terpenes are the oily part—the hydro-carbon oils of the lemon, of the lemon peels; they are a by-product from the manufacture of lemon flavor. Citral is derived from lemon grass, a grass that grows in the East Indies. Where we have a label which indicates that the contents of the package consists of a compound of lemon terpene and citral, which compound the manufacturer designates as "Special lemon," and the contents agree with the designation we do not see how it can be held that there has been a mis-branding within the meaning of the Act.

The second count charges that the same article was offered for sale as a product derived from lemon. A witness called by the government, who was engaged in the manufacture of crackers at Atlanta, Georgia, testified that he was visited there by a salesman of defendant. That the salesman showed him a sample in a bottle and told him it was pure lemon oil which he was able to sell at a low price because it was "second pressing." The witness ordered some of it, which was sent to him by defendant. The salesman, called by defendant, denied the making of any statements as to the article being lemon oil. Upon this conflict of evidence the finding of the jury that the representations were made is controlling here, and it
115 must be held that there was a misbranding under the Statute because Sec. 8 defines misbranding as, inter alia, "offering an article for sale" under the distinctive name of another article, even though no label describing it as such other article be actually affixed to it. Since intent is not an element of the offense, defendant must be held liable for the act of his sales-agent, although he had told him not to misdescribe the article.

The judgment under this count is affirmed.

W. J. Carlin, for the Plaintiff-in-Error.
R. P. Stephenson, Ass't U. S. Attorney for the Defendant-in-Error.

116 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 24th day of May, one thousand nine hundred and fifteen.

Present:

Hon. E. Henry Lacombe,
Hon. Henry G. Ward,
Hon. Henry Wade Rogers,
Circuit Judges.

(No. 1.)

OSCAR J. WEEKS, Doing Business as O. J. Weeks & Co., Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the said cause be and it hereby is remanded to said District Court with instructions to enter a judgment in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.
H. G. W.

117–131 Endorsed: United States Circuit Court of Appeals, Second Circuit. O. J. Weeks vs. U. S. (No. 1.) Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 25, 1915. William Parkin, Clerk.

132 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Oscar J. Weeks, doing business as O. J. Weeks & Company, is plaintiff in error, and the United States is defendant in error, No. 243, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for

certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

133 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-third day of March, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,153. Supreme Court of the United States, October Term, 1915. No. 870. Oscar J. Weeks, doing business under the name of O. J. Weeks & Company, vs. The United States. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 7, 1916. William Parkin, Clerk.

134 Supreme Court United States.

OSCAR J. WEEKS, Doing Business as O. J. Weeks & Co., Plaintiff-in-Error,
against
THE UNITED STATES, Defendant-in-Error.

It is hereby stipulated, consented and agreed by and between the attorneys for the respective parties hereto, that the record herein filed with the Petition for a Writ of Certiorari in the above entitled action, be taken and used herein as a return to the said Writ.

WALTER JEFFREYS CARLIN,
Attorney for Plaintiff-in-Error.
JNO. W. DAVIS, *Solicitor General.*

135 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mentioned is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is annexed hereto and certified as the return to the writ of certiorari issued herein.

Dated New York, April 7th, 1916.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 4/10/16. R. W. B.]

136 [Endorsed:] 870/25153. United States Circuit Court of Appeals, Second Circuit. Oscar J. Weeks, doing business as O. J. Weeks & Co., v. United States. Return to Writ of Certiorari.

137 [Endorsed:] File No. 52,153. Supreme Court U. S., October term, 1915. Term No. 870. Oscar J. Weeks, etc., Petitioner, vs. The United States. Writ of certiorari and return. Filed April 15, 1916.

138 Supreme Court of the United States, October Term, 1915.

OSCAR J. WEEKS, Doing Business under the Name of O. J. Weeks & Co., Plaintiff-in-Error,
against
THE UNITED STATES.

To the Solicitor General of the United States.

SIR: Please take notice that the annexed statement of points and of portions of record which should be printed in the above entitled action is served upon you pursuant to Section 9 of Rule 10 of the Supreme Court of the United States.

WALTER JEFFREYS CARLIN,
Attorney for Plaintiff-in-Error.

Two Rector Street, Borough of Manhattan, City of New York.

Service of the foregoing notice and a copy of statement therein mentioned is hereby acknowledged this 2nd day of May, 1916.

JNO. W. DAVIS,
Solicitor General of the United States.

139 Supreme Court of the United States, October Term, 1915.

OSCAR J. WEEKS, Doing Business under the Name of O. J. Weeks & Co., Plaintiff-in-Error,
against
THE UNITED STATES.

Statement of Points on Which Plaintiff-in-Error Intends to Rely and of Parts of Record Which Should Be Printed.

Statement of Points.

Point I.

The court below erred in holding that it was a violation of section 8 of the Food and Drugs Act for a manufacturer of food to ship a properly labeled article of food in interstate commerce, as to which article a salesman had made a false statement at the time when he took the order for same.

Point II.

The Food and Drugs Act as construed by the court below is unconstitutional.

Point III.

In any case the judgment should be reversed for a representation by a salesman is not binding upon the principal in a criminal action without proof of actual authority.

Statement of Parts of Record Which Should Be Printed.

The information as printed on pages 14, 15 and 16 to folio 47.
Demurrer as printed on pages 25 and 26.
Extract of minutes as printed on page 31. Pages 36, 37, 38, 39, 40 and 41 to the beginning of testimony of witness Smith, Fol. 122.
Page- 42 and 43 to end of examination of witness Fink.
Page 69 beginning at Fol. 206 L. 3 and ending at Fol.
140 207 L. 9.
Pages 70 and 71 to Fol. 212 L. 4.
Pages 70 and 71 to Fol. 212 L. 4.
Page 71 from Fol. 213 to end of page.
Pages 72, 73 to Fol. 218 L. 10.
Page 89 beginning at Fol. 267 L. 8 with the words "Mr. Carlin" ending at page 90 Fol. 268 L. 9 ending with the words "his authority."
Page 96 beginning with the Sixth Assignment of Error on L. 4 of Fol. 286 and incorporating the entire "Sixth," "Seventh," "Eighth," "Ninth," "Tenth," "Eleventh," "Twelfth," "Thirteenth," "Fourteenth," "Fifteenth," "Sixteenth," "Seventeenth," "Eighteenth," and "Nineteenth" Assignment- of Error as they appear on pages 96, 97 and 98.
Page 99, entire "Twenty-ninth" Assignment of Error.
Pages 99 and 100, the "Thirty-first" Assignment of Error.
Opinion by Lacombe, C. J., page 114 beginning at Fol. 341, entire pages 115, 116, 117.
The above pages refer to the Transcript of Record which was duly filed with the Clerk of the United States Supreme Court, pursuant to stipulation of counsel.

WALTER JEFFREYS CARLIN,
Counsel for Plaintiff-in-Error.

Two Rector Street, Borough of Manhattan, City of New York.

141 [Endorsed:] 870/25153. Supreme Court of the United States. Oscar J. Weeks, doing business under the name of O. J. Weeks & Co., Plaintiff-in-Error, against The United States. Original. Statement of Points and Record to be printed. Walter Jeffreys Carlin, Attorney for Plaintiff-in-Error, 2 Rector Street, Borough of Manhattan, New York City.

142 [Endorsed:] File No. 25,153. Supreme Court U. S., October term, 1915. Term No. 870. Oscar J. Weeks, etc., Petitioner, vs. The United States. Statement of points on which Petitioner intends to reply and proof of service of same. Filed May 10, 1916.

143 In the Supreme Court of the United States, October Term, 1915.

No. 870.

OSCAR J. WEEKS, Doing Business under the Name of O. J. Weeks & Company, Petitioner,

v.

THE UNITED STATES.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Additional Parts of the Record Designated by the United States to be Printed.

Page 32, top, to page 32, folio 96, line 5, ending "The jury is impaneled."

Page 41, folio 121, beginning with testimony of witness Smith, to bottom of page 41.

Page 43, folio 129, beginning with testimony of witness Dodge, to page 47, folio 141, ending, "Government Rests."

Page 73, folio 218, line 10, to page 73, folio 219, line 5,
144 ending, "good quality of onion soup."

Page 74, folio 222, beginning with testimony of witness Deghuee, to bottom of page 79.

Top of page 84, to page 86, folio 257, line 5, ending, "—it was offered."

Page 87, folio 260, line 11, beginning, "In both of these cases" to page 89, folio 265, line 3, ending "—the evidence justifies."

Page 89, folio 266, line 12, beginning, "Mr. Carlin: I respectfully ask the Court to charge," to page 89, folio 267, line 3, ending, "The Court: I have so charged."

Top of page 93, to page 93, folio 277, line 6, ending "Motions reserved."

Top of page 95, to page 95, end of folio 283.

Page 109, top, to page 109, line 8 from bottom, ending, "—of the Food and Drugs Act of June 30th, 1906."

Page 110, line 9, beginning, "The third information in its first count—," to page 110, line 18, ending, "—a product derived from lemon."

Page 113, line 32, beginning, "The second information deals with—," to bottom of page 115.

JOHN W. DAVIS,
Solicitor General.

May 31/16.

[Endorsed:] 870/25153.

145 [Endorsed:] File No. 25,153. Supreme Court U. S., October term, 1915. Term No. 870. Oscar J. Weeks, etc., Petitioner, vs. The United States. Designation by respondent of additional parts of the record to be printed. Filed June 1, 1916.

Office Supreme Court, U. S.
FILED
FEB 23 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 870.

OSCAR J. WEEKS, DOING BUSINESS UNDER THE NAME OF O. J. WEEKS & CO., PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

WALTER JEFFREYS CARLIN,
Counsel for Petitioner.

(25,153)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 870.

OSCAR J. WEEKS, DOING BUSINESS UNDER THE NAME OF O. J. WEEKS & CO., PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable the Supreme Court of the United States:

Comes now the petitioner, by his counsel, and prays for a writ of certiorari to the United States Circuit Court of Appeals, Second Circuit, to review a judgment of that court, affirming in part a judgment of the United States District Court for the Southern District of New York, finding the petitioner guilty of shipping in interstate commerce a certain misbranded article of food, namely, "Special Lemon," which said food was alleged to be misbranded, in that it was an imitation of lemon oil, and offered for sale by the

defendant under the distinctive name of another article, to wit, a product derived from lemon, whereas in fact the article was not a product derived from lemon, but was a mixture containing alcohol and citral, derived from lemon grass, and was alleged to be an imitation of a product derived from lemon, against the provisions of the Food and Drugs Act approved June 30, 1906, upon the following grounds:

First. Because it involves an interpretation of section 8 of the Pure Food and Drugs Act.

Second. Because it involved the important question of whether the representations of an agent or salesman of a food manufacturer which conflict with and contradict the label placed upon the package by the manufacturer may be binding upon the manufacturer, although he in every other way complies with the section of the Pure Food and Drugs Act, and although the said representation may not have been authorized to be made by the manufacturer in question.

Statement of the Case.

The petitioner, who is a manufacturer of supplies for confectioners and bakers, was prosecuted by information of the United States District Court of the Southern District of New York, charging him with shipping in interstate commerce an article of food called "Special Lemon," which was misbranded, in that it was an imitation of lemon oil, and was offered for sale under the distinctive name of another article, to wit, a product derived from lemon, whereas in truth it was a mixture containing alcohol and citral, derived from lemon grass.

There were two counts to this information:

First, that the statement "Special Lemon" was false and misleading, in that the statement would indicate that the article was a product derived from lemon, whereas in truth and in fact the article was not a product derived from lemon, but was a mixture containing alcohol and citral, derived

from lemon grass, and was in fact an imitation of lemon oil. Such statement was alleged to be such as to deceive and mislead a purchaser.

The second count alleged that the product was an imitation of lemon oil and was offered for sale under the distinctive name of another article, to wit, a product derived from lemon, whereas in truth and in fact the said article was not a product derived from lemon, but was a mixture containing alcohol and citral, derived from lemon grass.

The defendant was convicted in the District Court on both counts, but the first count was reversed by the Circuit Court of Appeals. The case turned upon the question of if whether the labels could control, no statements as to conversation should be heard. This was defendant's contention in both the District Court and the Circuit Court of Appeals. After the decision of the Circuit Court of Appeals the Government moved for a reargument, which was denied.

The Decision in the Case.

The decision of the Circuit Court of Appeals of the Second Circuit, as shown by a copy of its opinion herewith filed, was upon the following grounds:

1. That the article was properly labeled and that it was offered for sale under the name of another article, in violation of section 8.

2. That a manufacturer who properly labeled his goods may be held for false statements made by his salesmen, although he instructs his salesmen not to misdescribe the article, and such false statements of the salesman constitute misbranding.

Conclusion.

The construction placed upon section 8 by the court below is unwarranted and it would construe the court to a holding that the Food and Drugs Act is unconstitutional.

The construction would imperil every manufacturer of foods in the United States, for by the court's ruling an article of food properly and correctly branded may be held to be misbranded by alleged oral statements of a salesman. Under the construction the label on the product shipped in interstate commerce must be held not to be the label annexed to the product when it is actually shipped, but oral statements made at the time when the order was taken, statements as to which the manufacturer had no knowledge or information.

A certified copy of the entire transcript of the record in the case, including the proceeding in the said Circuit Court of Appeals of the Second Circuit, is filed herewith as an exhibit hereto and prayed to be taken as a part hereof.

OSCAR J. WEEKS, *Petitioner,*
By WALTER JEFFREYS CARLIN,
His Counsel.

SUPREME COURT OF THE UNITED STATES.

OSCAR J. WEEKS, *Doing Business under the Name of O. J. Weeks & Co., Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

The petitioner submits that:

Point I.

THE COURT BELOW ERRED IN HOLDING THAT IT WAS A VIOLATION OF SECTION 8 OF THE FOOD AND DRUGS ACT FOR A MANUFACTURER OF FOOD TO SHIP A PROPERLY LABELED ARTICLE OF FOOD IN INTERSTATE COMMERCE, AS TO WHICH ARTICLE A SALESMAN HAD MADE A FALSE STATEMENT AT THE TIME WHEN HE TOOK THE ORDER FOR SAME.

Point II.

THE FOOD AND DRUGS ACT AS CONSTRUED BY THE COURT BELOW IS UNCONSTITUTIONAL.

ARGUMENT.

The Food and Drugs Act provides in its title that it is "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes."

As to "manufacture" and "regulating traffic therein" the

provisions apply to the Territories and the District of Columbia, and it may be that the particular part of section 8 in question also applies only to the Territories and the District of Columbia.

The act, then, prohibits "the introduction into any State or Territory" of any article of food or drug misbranded or adulterated within the meaning of the act.

It is with misbranding under section 8 of the law that we have here to do.

The second count of the information in this case (Record, p. 15, fol. 44) charges that the petitioner—

> "did ship and deliver for shipment from the city of New York, State of New York, to the city of Atlanta, State of Georgia, consigned to T. S. Lewis & Company, Incorporated, a certain article of food labeled as follows:
>
> "'*Special Lemon.*
>
> "'LEMON TERPENE AND CITRAL—O. J. WEEKS & Co., New York, N. Y., U. S. Serial Number 2049. Guaranteed under the Food & Drugs Act, June 30, 1906,'
>
> which said article shipped as aforesaid was misbranded, in that it was an imitation of lemon oil and was offered for sale by the said Oscar J. Weeks under the distinctive name of another article, to wit, a product derived from lemon, whereas, in truth and in fact, the said article was not a product derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass, and was, in fact, an imitation of a product derived from lemon."

The charge is distinctly "a shipment in interstate commerce," yet the court below, after holding the label on the product a proper one (Record, p. 114, fol. 342), upheld the conviction on this second count, saying (Record, p. 115, fol. 344 *et seq.*):

"The second count charges that the same article was offered for sale as a product derived from lemon. A witness called by the Government, who was engaged in the manufacture of crackers at Atlanta, Georgia, testified that he was visited there by a salesman of defendant. That the salesman showed him a sample in a bottle and told him it was pure lemon oil which he was able to sell at a low price because it was 'second pressing.' The witness ordered some of it, which was sent to him by defendant. The salesman, called by defendant, denied the making of any statements as to the article being lemon oil. Upon this conflict of evidence the finding of the jury that the representations were made is controlling here, and it must be held that there was a misbranding under the statute because section 8 defines misbranding as, *inter alia*, 'offering an article for sale' under the distinctive name of another article, even though no label describing it as such other article be actually affixed to it. Since intent is not an element of the offense defendant must be held liable for the act of his sales agent, although he had told him not to misdescribe the article."

Proper objections were taken by your petitioner and due assignments of error were presented to the Circuit Court of Appeals (assignments of error 30, 31, Record, pp. 99, 100).

The act povides in part:

"SEC. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced."

* * * * * * *

"In the case of food:

"First. If it be an imitation of or offered for sale under the distinctive name of another article."

* * * * * * *

> *"Provided,* That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> "First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced."

It can readily be seen that this construction makes the test, *not the label* on the article, but an *oral representation made before the shipment,* which oral representation contradicts the label. Consider this—what can a manufacturer do? Is he to be at the mercy of every customer and salesman? Surely if he properly brands his goods he does no act in violation of the statute. The question is *not* what the customer ordered, but what did the petitioner "introduce" into another State. The information charges that he shipped in interstate commerce an article of food improperly labeled. The court found that the label was a true one, but that an oral statement made by the salesman at the time he took the order destroyed the force and effect of the label. If the salesman had made no statement there could be no conviction. Can the court hold that the oral representation was in effect shipped in interstate commerce with the article?

If there had been no order at all and the goods had been improperly labeled an offense would have been committed.

If the petitioner had not labeled his goods at all a more difficult case would be presented. One such case arose that related to a shipment of a carload of wheat in interstate commerce which was alleged to be misbranded. The car and the wheat bore no label, yet the District Court in charging the jury, while apparently admitting that if there was a label it would control, said:

"You are further instructed on this question as to the second subdivision of misbranding. The food in question, as you are well aware, was that of a carload of wheat in bulk, and was not sacked or in boxes, or packages of any kind, but many hundreds of bushels of wheat in the one car. The Government contends that it would be a physical impossibility, or at least it would be very inconvenient, if it could be done at all, to put or print a written label on such wheat in bulk. If you find that to be so, that is to say, that it would be either impossible or most inconvenient to thus label a car of wheat in bulk, you are instructed that the label in such a case consists of the designation of the quality by an invoice sheet and by a certificate of inspection made by inspectors in the employ of the State of Missouri, and issued to the consignor, and with or separately sent to the purchaser at Ft. Worth, Texas; that, within the meaning of the statute, would be the label or brand as designated by the seller to the purchaser in question of the wheat. That is to say, it is the contention of the Government that the designation in the account sales and in the certificate of inspection above referred to, of the wheat in question, as No. 2 red wheat, constitutes a label and brand of the wheat as No. 2 red wheat. You are therefore instructed that if you find and believe from the evidence, beyond a reasonable doubt, that the defendant, at or about the time this wheat was shipped in interstate commerce and sold or offered for sale by it to the Walker Grain Company at Ft. Worth, Texas, rendered an account sales to the Walker Grain Company, wherein the wheat in question was designated as No. 2 red wheat, when, in fact, it was mixed wheat, and sent or caused to be sent to the Walker Grain Company, a certificate of inspection issued by the grain inspector of the State of Missouri, and that these papers constitute a part of the transaction connected with the sale of said wheat, then the court instructs you that said wheat was misbranded within the meaning of the statute in question, and your verdict will be for the Government upon this branch of the question of misbranding. If, on the other hand, you find and believe that the

> account sales and the certificate of inspection were not sent to the Walker Grain Company by the defendant as a part of this transaction and that the wheat in question was not designated as No. 2 red wheat, then your verdict will be for the defendant upon this branch of the question" (notice of judgment, 1135).

The case went up on a writ of error and the Circuit Court of Appeals (Hall-Baker Grain Co. *vs.* United States, 198 Fed., 614), referring to this part of the case, said at page 617:

> "The second charge was that the wheat was labeled and marked No. 2 red wheat when it was in fact mixed wheat, so as to deceive and mislead the purchasers thereof. But there was no evidence that it was ever labeled or marked at all. The Government offered the invoice of the wheat in evidence, over the objection of the defendant, to prove a label, but this invoice contained a provision similar to that in the contract of sale to the effect that the wheat was to be governed by the Missouri grades, and the wheat had been already inspected and graded No. 2 red wheat by the official inspector several days before the invoice was issued. There was no evidence of any false labeling to deceive purchasers here."

In cases where, as here, a truthful label is annexed we contend that no conversations or writings of any one, even of the principal, can be admitted to vary or modify the label, and certainly the label cannot be modified by a mere salesman.

This is not an action brought by the purchaser on the ground of fraud, nor a prosecution for defrauding a purchaser, yet such was the form in which it went to the jury. It is a prosecution which creates an offense unknown to the common law. The claim of the Government is based on the first subdivision of section 8 of the Food and Drugs Act, but it is submitted that this section, and particularly the latter

part of it, must be read in conjunction with all the other sections in section 8 and in the act.

It is submitted that the Food and Drugs Act is intended to apply only to the adulteration and misbranding of articles and to prevent their "introduction into any State or Territory." It does not purport, nor do the debates in Congress even intimate, that under this act the contracts and correspondence of the persons engaged in interstate commerce were to be considered in determining as to whether or not there was a violation of the act. This is shown by sections 3 and 4 of the act, which provide for the examination of foods and drugs, not for an examination of the books or papers of the shipper or consignee. The goods and the label are made the test. Throughout the debates in Congress the entire section 8 was considered as one section, and the recent cases in the United States Supreme Court show the intent and purpose of the act (McDermott *vs.* State of Wisconsin, 228 U. S., 115).

That the wording of the label controls, see Nave McCord *vs.* United States, 192 Fed., 46-48 (C. C. A., 8th Cir.); U. S. *vs.* One Carload of Corno H. & M. Feed, 188 Fed., 453. That the provisos limit the entire section, see the foregoing cases and United States *vs.* Ten Barrels of Vinegar, 186 Fed., 399; United States *vs.* 68 Cases of Syrup, 172 Fed., 781. *The label itself controls; even a circular enclosed in a package cannot be considered* (United States *vs.* American Druggists Syndicate, 186 Fed., 387).

Point III.

IF THE ACT BE HERE CONSTRUED AS BY THE COURT BELOW THE FOOD AND DRUGS ACT WOULD BE UNCONSTITUTIONAL.

The claim is that the "offering for sale under the distinctive name of another article" is an offense against the United States—not the selling, not the shipping in interstate commerce, but the offering.

In other words, if a manufacturer's salesman offers for sale in a State an article—whether it ever be shipped in interstate commerce or not, or whether or not he states it will be shipped in interstate commerce—an offense is committed under the Food and Drugs Act.

In other words, when the petitioner's salesman *offered* the article for sale the offense was complete, whether the petitioner made the delivery from his goods in the State where the offer was made or from another State—in fact even if no shipment at all was made.

More than that, when the representation was made, though the offense was then complete, no one could tell what the principal would do. If the salesman said, "I will ship you olive oil," and the principal shipped a bottle of whiskey there would be an offense. But if he shipped olive oil, would there have been an offense? Suppose a principal was in the extract business, as here, and a salesman offered to sell vanilla extract, but the principal shipped in interstate commerce oil of rose properly labeled, would there be an offense?

A transaction in a State—an offering for sale—cannot be held to be interstate commerce, and if the act in question be construed to include such offering the act is in violation of the Constitution.

It is respectfully submitted that a writ should issue.

WALTER JEFFREYS CARLIN,
Counsel for Petitioner, 2 Rector Street,
Borough of Manhattan, City of New York.

Solicitor General of the United States.

SIR: Please take notice that the foregoing petition and brief, together with the transcript of record therein mentioned, will be submitted to the Supreme Court of the United States on Monday, March 13, A. D. 1916, at the opening of court, or as soon thereafter as counsel can be heard.

WALTER JEFFREYS CARLIN,
Counsel for the Petitioner.

Service of the foregoing notice and a copy of the petition and brief therein mentioned is hereby acknowledged this 21st day of February, A. D. 1916.

JNO. W. DAVIS,
H.,
Solicitor General of the United States.

[Endorsed:] Supreme Court of United States. Oscar J. Weeks, Doing Business under the Name of O. J. Weeks & Co., Petitioner, *vs.* The United States of America. Original. Petition for Writ of Certiorari, Brief, and Notice. Walter Jeffreys Carlin, Attorney for Petitioner, 2 Rector street, borough of Manhattan, New York City.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

OSCAR J. WEEKS, DOING BUSINESS UNDER the name of O. J. Weeks & Co., petitioner,
v.
THE UNITED STATES.
No 870.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

This case involves the construction of the food and drugs act of June 30, 1906 (c. 3915, 34 Stat. 768), the pertinent provisions of which are as follows:

> SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded:

* * * * *

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

STATEMENT OF FACTS.

The first count of the information charged that an article of food labeled:

SPECIAL LEMON.

LEMON TERPENE AND CITRAL—O. J. WEEKS & Co., New York, N. Y., U. S. Serial Number 2049. Guaranteed under the Food & Drugs Act, June 30, 1906. (R., 15.)

was misbranded, in that the name "Special Lemon" was false and misleading and indicated that the article was a product derived from lemon when it was only an imitation of lemon oil. The second count charged that the article was misbranded because it was an imitation of and offered for sale under the distinctive name of another article, to wit, a product derived from lemon.

The article consisted for the most part of terpene, a by-product in the manufacture of lemon extract, and citral, derived from lemon grass, while lemon oil contains many other elements. The traveling salesman who took the consignee's order represented the article to be a true lemon product, and displayed a sample bottle bearing only the words "Special Lemon."

The trial court convicted the defendant on both counts. The Circuit Court of Appeals reversed the conviction on the first count, but sustained the conviction on the second count.

QUESTION INVOLVED.

Is an imitation lemon oil, which is labeled "Special Lemon—Lemon Terpene and Citral," and which is represented by the salesman taking the consignee's order to be a true lemon oil, misbranded under the food and drugs act?

ARGUMENT.

Petitioner contends that the words "offered for sale under the distinctive name of another article" are confined in application to false statements on labels and do not include misrepresentations by salesmen of a properly labeled article.

The part of the act in question provides that an article will be deemed to be misbranded "if it be an imitation of or offered for sale under the distinctive name of another article." The second count of the information, the one here under consideration, charges that the article was both "an imitation of" and "offered for sale under the distinctive name of another article." If either of these charges be true, the judgment on this count must be sustained.

I.

Product an imitation of another article.

The article, though sold under the name of "Special Lemon," is not a lemon oil, as its name would imply. Petitioner admits that the name "Special Lemon"

alone would be misleading. (R. 72.) The addition on another line of the label of the words "Lemon Terpene and Citral" does not correct the false impression given by the misleading name and deceptive appearance of the article. The ordinary purchaser is ignorant of the nature of terpene and citral, and even the expert acquainted with their characteristics would naturally be led by the name under which the article was sold to believe that this was a special lemon oil containing added lemon terpene and citral.

Though the Court of Appeals considered the label to be within the law, which the Government denies, nevertheless its judgment sustaining the conviction on the second count was correct and should be affirmed. Appellate courts review the judgments of inferior courts, not their opinions. (*Smith* v. *Whitney*, 116 U. S. 167, 174–175; *Public Clearing House* v. *Coyne*, 194 U. S. 496.)

It is submitted, therefore, that, apart from the oral misrepresentations, the record shows the article was an "imitation" within the meaning of the act.

II.

Oral misrepresentation within the act.

The words of the section of the act in question are broad enough to cover oral representations. In fact, as Congress was aware, many, if not most, of the articles of food passing in interstate commerce—as meat, milk, wheat, etc.—bear no labels at all. Oral representations are just as effective in starting illegitimate articles on an interstate movement as written

representations, whether in the form of labels or letters, and wherever such movement results from an oral or written offering "for sale under the distinctive name of another article" the act is violated. Indeed, the labels may not have influenced the interstate movement at all, and may not have been seen until it had terminated, while, on the other hand, the oral representations may be entirely responsible for such movement. The purpose of the act is to prevent transportation of illegitimate articles in interstate commerce, and to accomplish this, such oral misrepresentations must be forbidden.

Petitioner is responsible for the acts of his salesmen. (*Groff* v. *State*, 171 Ind. 547, 548, 550; *Brown* v. *Foot*, 17 Cox's Cr. Law cases, 509; *McIntyre* v. *Pryor*, 173 U. S. 38, 52; *Schuchardt* v. *Allens*, 1 Wall. 359; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *Haskell* v. *Starbird*, 152 Mass. 117, 120.) Criminal intent on the part of the defendant is not an essential element of the offense. (*United States* v. *Thirty-six Bottles of London Dry Gin*, C. C. A. 3d Cir., 210 Fed. 271, and cases cited; *Commonwealth* v. *Sacks*, 214 Mass. 72, 74 and cases cited; *Groff* v. *State*, 171 Ind. 547, 553.)

If the statute does not apply in such cases, there will be left open a wide field for fraud in interstate commerce. The only other Circuit Court of Appeals which has considered this question indicated that these words of the statute are not limited in scope to labels. (*Hall-Baker Grain Co.* v. *United States*, 198 Fed. 614, 617.)

III.

Act so construed not unconstitutional.

Petitioner's contention that such construction would render the statute unconstitutional is not sound. The oral misrepresentations were a part of an interstate transaction and the inducing cause of the subsequent movement of the product in interstate commerce.

> The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. (*Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497; *Crenshaw* v. *Arkansas*, 227 U. S. 389, 396.)

This court has held that the facilities of interstate commerce may be denied to all illegitimate transactions. (*The Lottery Case*, 188 U. S. 321; *Hoke* v. *United States*, 227 U. S. 308; *McDermott* v. *Wisconsin*, 228 U. S. 115; *Eckman Mfg. Co.* v. *United States*, 239 U. S. 510.)

CONCLUSION.

There is no conflict of decisions on the points raised in the petition, and the judgment below, it is submitted, was correct. The petition should be denied. (*Lau Ow Bew*, 141 U. S. 583, 587; *Forsyth* v. *Hammond*, 166 U. S. 506; *United States* v. *Rimer*, 220 U. S. 547.)

Respectfully,

JOHN W. DAVIS,
Solicitor General.

MARCH, 1916.

○

Office Supreme Court, U. S.
FILED
DEC 8 1917
JAMES D. MAHER,
CLERK.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 109.

OSCAR J. WEEKS, DOING BUSINESS UNDER THE NAME OF O. J. WEEKS & CO., PETITIONER,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONER, OSCAR J. WEEKS.

WALTER JEFFREYS CARLIN,
Counsel for Petitioner.

(25,153)

	Page.
Act does not require goods to be labeled at all	12
Act so construed unconstitutional	21
Article "introduced" into interstate commerce under its own name not the distinctive name of any other article	22
Article shipped properly labeled	22
Brief of argument	5
Cases cited by United States distinguished	19
Cases of goods not labeled at all	11
Congress cannot control offers made within States	21
Construction of act should be for protection of both public and manufacturers	24
Contents of vial shown by salesman never tested or shipped	24
Conviction sustained on ground that article was sold under distinctive name of another article	16
Count of information in question	7
Decision below makes "offering" without shipment an offense	21
Drummers cannot make contracts of sale	22
Even circular could not be considered prior to amendment	14
Examination of foods under act	13
Importance of label on goods as stated by this court	11
Label cannot be varied by oral statement	9
No negligence in choosing agents	14
No possible protection to manufacturers if construction of court below is followed	14
Not an action for fraud	13
Offense complete under decision below, whether shipment made or not	21
Only real "offer" of goods was by the shipment of properly labeled goods	23
Opinion court below *re* second count	8
Oral statement of salesman could not be shipped in interstate commerce	20
Principal liable in certain cases under section 12 of act	20
Provisions of title of Food and Drugs Act	7
Purchaser got just what he ordered	22
Purpose of act must be considered in interpreting it	13
Purpose of Food and Drugs Act	15

Page

Regulation as to goods without labels 12
Salesman cannot "offer" goods for sale; they are mere order takers 23
Salesman instructed not to misrepresent goods 14
Salesman without authority to alter labels—hence statement not act "within scope of his employment" 20
Section 8, Food and Drugs Act 9
Specifications of error 3
State courts open in cases of fraud 10
Statement of case 1
Statements of salesman not binding on principal 16
Statute should not be made trap for honest manufacturers 10
Unauthorized statement of salesman cannot be an act to convict principal of crime 16
Wording of label controls 13

INDEX OF AUTHORITIES CITED.

Boos *vs.* State, 105 N. E., 117 6
Cafre *vs.* Lockwood, 22 N. Y. App. Div., 11 6
Clough *vs.* Whitcomb, 105 Mass., 482 6
Commonwealth *vs.* Nichols, 51 Mass., 259 6
Commonwealth *vs.* Riley, 210 Mass., 387 6
Food & Drugs Act 5
Groff *vs.* State, 171 Ind., 547 6
Greeley on Food & Drugs 5
Grocery Co. *vs.* Beckett, 57 S. W., 458 6
Hall Baker Grain Co. *vs.* U. S., 198 Fed., 614 5
Haskell *vs.* Starbird, 152 Mass., 117 6
Hipolite Egg Co. *vs.* U. S., 220 U. S., 45 5
John Mathews *vs.* Renz, 61 S. W., 9 6
Kercheval *vs.* Allen, 220 Fed., 262 6
Lindow *vs.* Cohn, 90 Pac., 485 6
Maisenbacher *vs.* Society Concordia, 42 Atl., 67 6
McDermott *vs.* Wisconsin, 228 U. S., 115 5
McDonald *vs.* Hearst, 95 Fed., 656 6
McIntyre *vs.* Pryor, 173 U. S., 38 6
McKeige *vs.* Carroll, 120 N. Y. App. Div., 521 6
Nave McCord *vs.* U. S., 182 Fed., 46 5
Norfolk & P. Traction Co. *vs.* Miller, 174 Fed., 607 6
Pacific Packing & Nav. Co. *vs.* Fielding, 136 Fed., 577 6

Page

Schreiber *vs.* Sharpless, 6 Fed., 175..... 6
Taylor *vs.* Gilman, 24 Fed., 632..... 6
Toledo, etc., Co. *vs.* Gordon, 143 Fed., 95..... 6
U. S. *vs.* American Druggists' Syndicate, 186 Fed., 387..... 5
U. S. *vs.* Gooding, 12 Wheat., 460..... 6
U. S. *vs.* One Carload Corno H. & M. Feed, 188 Fed., 453..... 5
U. S. *vs.* 68 Cases of Syrup, 172 Fed., 781..... 5

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BRIEF FOR PETITIONER, OSCAR J. WEEKS.

This case comes here on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Oscar J. Weeks, doing business under the name of O. J. Weeks & Co., was prosecuted upon an information in the United States District Court charging him, in two counts, with having shipped in interstate commerce a certain article of food labeled—

"Special Lemon
Lemon Terpene and Citral.
O. J. Weeks & Co., New York, N. Y.
U. S. Serial Number 2049. Guaranteed under the Food & Drugs Act, June 30, 1906."

The first count alleged that the article was misbranded, in that the product purported to be a product derived from

lemon (Record, p. 1), whereas in truth the product was not derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass.

The defendant was found guilty on this count, but this was reversed by the Circuit Court of Appeals (Record, p. 25), the court finding that the contents of the package agreed with the designation on the label and that there was no misbranding (Record, p. 26). From this decision no appeal was taken, and the first count is therefore disposed of except as the decision thereon may affect the decision on the second count.

The second count on which the defendant was convicted and on which the conviction was affirmed by the Circuit Court of Appeals (Record, p. 26), and which is the count now before this court by virtue of the order of this court allowing the writ of certiorari, referred to the same shipment of the same product with the aforesaid label (which label was expressly approved by the Circuit Court of Appeals as aforesaid, Record, p. 26), and charged "that the product was offered for sale under the distinctive name of another article."

The Circuit Court of Appeals upheld the conviction on the ground that representations made by a salesman of defendant at the time he took the order were controlling and that such representations constituted a misbranding, in that they were an "offering of an article for sale" under the distinctive name of another article (Record, p. 26).

We contend that the label on the article controls and that a manufacturer who properly labels his goods and ships them in interstate commerce cannot be held to have misbranded them—and this regardless of any statements made by the drummer at the time he took the order.

Specifications of Error.

Sixth. The learned court below erred in denying defendant's motion in arrest of judgment in the Special Lemon case.

Seventh. The learned court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Now, please state what occurred when that salesman came there?" and in overruling defendant's objection thereto.

Eighth. The learned court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Now, Mr. Lewis, what did Mr. Fink tell you regarding the article he proposed to sell you?" and in overruling defendant's objection thereto.

Ninth. The learned court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Pure—what kind of oil?" and in overruling defendant's objection thereto.

Tenth. The learned court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Do you know what the general understanding in the trade of Sanderson's grade lemon oil is?" and in overruling defendant's objection thereto.

Eleventh. The learned court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. What else did he say—anything about the price?" and in overruling defendant's objection thereto.

Twelfth. The learned court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. How much?" and in overruling defendant's objection thereto.

Thirteenth. The learned court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Was that less than the current price of pure oil of lemon?" and in overruling defendant's objection thereto.

Fourteenth. The learned court below erred in permitting

the witness, Thomas S. Lewis, to answer the following question: "Q. Did you speak to him about that?" and in overruling defendant's objection thereto.

Fifteenth. The learned court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. What occurred then?" and in overruling defendant's objection thereto.

Sixteenth. The learned court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Then what did you do?" and in overruling defendant's objection thereto.

Seventeenth. The learned court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. That is, you ordered some, did you?" and in overruling defendant's objection thereto.

Eighteenth. The learned court below erred in permitting the witness, Thomas S. Lewis, to answer the following question: "Q. Now, is this the invoice you received for that order you gave (showing witness paper)?" and in overruling defendant's objection thereto.

Nineteenth. The learned court below erred in admitting in evidence the invoice (Government's Exhibit 2), and in overruling defendant's objection thereto.

* * * * * * *

Twenty-ninth. The learned court below erred in refusing to give the following charge requested by the defendant in the Special Lemon case: "I ask the court to charge that that first subdivision applies to and modifies the section one which was read by the court. They both must be considered together, in the law of misbranding."

* * * * * * *

Thirty-first. The learned court below erred in refusing to give the following charge requested by the defendant in the Special Lemon case: "I respectfully ask the court to charge that the jury can only consider the statement on the label, and cannot consider the testimony in regard to the conversation had by a salesman in Atlanta."

BRIEF OF ARGUMENT.

Point I.

THE COURT BELOW ERRED IN HOLDING THAT IT WAS A VIOLATION OF SECTION 8 OF THE FOOD AND DRUGS ACT FOR A MANUFACTURER TO SHIP A PROPERLY LABELED ARTICLE OF FOOD IN INTERSTATE COMMERCE, AS TO WHICH ARTICLE A SALESMAN HAD MADE A FALSE STATEMENT AT THE TIME WHEN HE TOOK THE ORDER FOR THE SAME.

Food and drugs act.

U. S. *vs.* One Carload of Corno H. & M. Feed, 188 Fed., 453.

McDermott *vs.* Wisconsin, 228 U. S., 115.

Hall-Baker Grain Co. *vs.* U. S., 198 Fed., 614.

U. S. *vs.* American Druggists Syndicate, 186 Fed., 387.

Hipolite Egg Co. *vs.* U. S., 220 U. S., 45.

Greely on Foods and Drugs.

Nave McCord *vs.* United States, 182 Fed., 46-48.

U. S. *vs.* 68 Cans of Syrup, 172 Fed., 781.

Point II.

IN ANY CASE THE JUDGMENT SHOULD BE REVERSED, FOR A REPRESENTATION BY A SALESMAN IS NOT BINDING UPON THE PRINCIPAL IN A CRIMINAL ACTION WITHOUT PROOF OF ACTUAL AUTHORITY.

Schreiber *vs.* Sharpless, 6 Fed., 175.
Tayler *vs.* Gilman, 24 Fed., 632.
McDonald *vs.* Hearst, 95 Fed., 656.
Norfolk & P. Traction Co. *vs.* Miller, 174 Fed., 607.
Pacific Packing & Nav. Co. *vs.* Fielding, 136 Fed., 577.
Toledo, St. L. & W. Ry. Co. *vs.* Gordon, 143 Fed., 577.
Kercheval *vs.* Allen, 220 Fed., 262.
Maisenbacher *vs.* Society Concordia, 42 Atl., 67.
Commonwealth *vs.* Nichols, 51 Mass., 259.
Commonwealth *vs.* Riley, 210 Mass., 387.
U. S. *vs.* Gooding, 12 Wheat., 460.
McIntyre *vs.* Pryor, 173 U. S., 38.
Haskell *vs.* Starbird, 152 Mass., 117.
Groff *vs.* State, 171 Ind., 547.
Boos *vs.* State, 105 N. E., 117.
John Matthews *vs.* Renz, 61 S. W., 9.
Grocery Co. *vs.* Beckett, 57 S. W., 450.
Lindow *vs.* Cohn, 90 Pac., 485.
Clough *vs.* Whitcomb, 105 Mass., 482.
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ARGUMENT.

Point I.

THE COURT BELOW ERRED IN HOLDING THAT IT WAS A VIOLATION OF SECTION 8 OF THE FOOD AND DRUGS ACT FOR A MANUFACTURER TO SHIP A PROPERLY LABELED ARTICLE OF FOOD IN INTERSTATE COMMERCE, AS TO WHICH ARTICLE A SALESMAN HAD MADE A FALSE STATEMENT AT THE TIME WHEN HE TOOK THE ORDER FOR THE SAME.

The Food and Drugs Act provides in its title that it is "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes." The act then prohibits "the introduction into any State or Territory" of any article of food or drug misbranded or adulterated within the meaning of the act.

It is with misbranding under section 8 of the act that we have to do in this case.

The second count of the information in this case (Record, p. 2) charges that the petitioner—

> "did ship and deliver for shipment from the city of New York, State of New York, to the city of Atlanta, State of Georgia, consigned to T. S. Lewis & Company, Incorporated, a certain article of food labeled as follows:
>
> " 'Special Lemon.
>
> " 'LEMON TERPENE AND CITRAL—O. J. WEEKS & CO., New York, N. Y., U. S. Serial number 2049. Guaranteed under the Food & Drugs Act, June 30, 1906,'
>
> "which said article shipped as aforesaid was misbranded, in that it was an imitation of lemon oil and was offered for sale by the said Oscar J. Weeks under

> the distinctive name of another article, to wit, a product derived from lemon, whereas, in truth and in fact, the said article was not a product derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass, and was, in fact, an imitation of a product derived from lemon."

The charge is distinctly "a shipment in interstate commerce," yet the court below, after holding the label on the product a proper one (Record, p. 26, fol. 114), upheld the conviction on this second count, saying (Record, p. 26, fol. 114-115):

> "The second count charges that the same article was offered for sale as a product derived from lemon. A witness called by the Government, who was engaged in the manufacture of crackers at Atlanta, Georgia, testified that he was visited there by a salesman of defendant. That the salesman showed him a sample in a bottle and told him it was pure lemon oil which he was able to sell at a low price because it was 'second pressing.' The witness ordered some of it, which was sent to him by defendant. The salesman, called by defendant, denied the making of any statements as to the article being lemon oil. Upon this conflict of evidence the finding of the jury that the representations were made is controlling here, and it must be held that there was a misbranding under the statute because section 8 defines misbranding as, *inter alia*, 'offering an article for sale' under the distinctive name of another article, even though no label describing it as such other article be actually affixed to it. Since intent is not an element of the offense defendant must be held liable for the act of his sales agent, although he had told him not to misdescribe the article."

Proper objections had been taken by your petitioner and due assignments of error were presented to the Circuit Court of Appeals (Record, pp. 21, 22).

The act provides in part:

"Sec. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients, or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced."

* * * * * * *

"In the case of food:

"First. If it be an imitation of or offered for sale under the distinctive name of another article."

* * * * * * *

"Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced."

The action of the court below in sustaining the conviction on the second count brings up squarely the question of whether a properly labeled article can be misbranded within the act by an oral statement of the salesman soliciting the order. It is submitted that this cannot be true and that the act was never intended to apply to such a set of facts. The question is not what the customer ordered or whether he got what he ordered or not. The local tribunals are open to him and the local laws will protect him if he was thus cheated. He can return the goods and repudiate the sale; he can retain them and recover damages for not getting what was sold him; he may even have an action for fraud. He has ample

protection under the State laws, and it is not necessary to stretch the Federal act to give him protection.

Further, the Food and Drugs Act prohibits the "introduction into any State or Territory" of an article misbranded under the act. The question under the act is, What did the defendant *introduce* into a State or Territory and was it misbranded? The information charges that he shipped in interstate commerce an article of food that was improperly labeled. The court below found the label to be a true one. Can it be held that the oral statement of the salesman made in Atlanta was shipped in interstate commerce with the article?

The cases under the act all show the importance attached to the label. In U. S. *vs.* One Car Load of Corno H. & M. Feed, 188 Fed., 453, at page 457, the court said:

> "The label does not contain any design or device of any kind, and whether there has been a misbranding within the meaning of the statute must depend on the words employed in the label to describe the Corno Horse and Mule feed. Save by the declarations in the statute as to what a label shall not contain, no standards are prescribed for brands or labels, or the minuteness or particularity in which they must indulge in describing an article of food. The statute shall be liberally construed to effect its beneficent purpose; but no rule of construction permits us to so construe its language that the statute shall operate as a snare or trap to the honest manufacturer or producer, who brands or labels his product in descriptive words or devices, which fairly inform the purchaser of the nature and ingredients of the product offered for sale, and are not so framed as to deceive or mislead the ordinary purchaser."

In this case the label is the controlling thing, and there is no intimation that a label is affected by or in any way to be altered by any oral statement. The attention of the court is also respectfully directed to the remarks there made in regard to construing the statute so that it shall not be a trap to the

honest producer. It is submitted that the interpretation given the statute by the court below makes of it the trap denounced in this excerpt and puts the manufacturer, no matter how careful he may be, at the mercy of the salesman sending in an order to him.

The importance which *this* court has attached to the label is shown in the case of McDermott *vs.* Wisconsin, 228 U. S., 115. This court there stated that a law of the State of Wisconsin forbidding all labels on articles but such as were in the statute prescribed was unconstitutional and invalid. This court discussed the effect of that statute in connection with the Food and Drugs Act. Upon the importance of the label under the Federal Act the court had this to say (page 132):

> "The label upon the unsold article is, in the one case, the evidence of the shipper that he has complied with the act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the Federal authorities depend to reach and punish the shipper and to condemn the goods. If truly labeled within the meaning of the act, his goods are immune from seizure by Federal authority; if the label is false or misleading within the terms of the law, the goods may be seized and condemned. In other words, the label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress."

It is submitted that this court cannot consistently refuse to allow a sovereign State to remove or alter the label on an interstate shipment and yet permit that label to be altered by an unauthorized statement, or, as in the case at bar, by a statement made in disobedience to his instructions by a traveling salesman. Yet such is the position into which the decision below puts the law.

We do not touch the question of the effect of the statements of a salesman if the goods should bear no label. That question is not here involved and we need not consider it at

length. One such case arose in which a carload of wheat was alleged to have been misbranded. The car and the wheat had no label, but apparently the District Court in charging the jury admitted that if there were a label it would control. The case went up upon writ of error, and the Circuit Court of Appeals (Hall-Baker Grain Co. *vs.* U. S., 198 Fed., 614), referring to that part of the case, said at page 617:

> "The second charge was that the wheat was labeled and marked No. 2 red wheat when it was in fact mixed wheat, so as to deceive and mislead the purchasers thereof. But there was no evidence that it was ever labeled or marked at all. The Government offered the invoice of the wheat in evidence, over the objection of the defendant, to prove a label, but this invoice contained a provision similar to that in the contract of sale to the effect that the wheat was to be governed by the Missouri grades, and the wheat had been already inspected and graded No. 2 red wheat by the official inspector several days before the invoice was issued. There was no evidence of any false labeling to deceive purchasers here."

The situation in the case at bar is not, however, the difficult one arising in that case. Here the goods were labeled, and it is found by the court below that they were properly labeled.

It was early recognized that the act did not require a food or drug to be labeled at all except under certain conditions (Greeley on Food and Drugs Act, p. 46), and the Department of Agriculture issued a regulation providing for just such a situation. The regulation reads as follows:

> "Regulation 22. Articles without a Label. (Section 8, paragraph 1, under 'Drugs;' paragraph 1, under 'Foods.')
>
> "It is prohibited to sell or offer for sale a food or drug product bearing no label upon the package or no descriptive matter whatever connected with it, either by design, device or otherwise, if said product be an imitation of or offered for sale under the name of another article."

In cases where, as here, a truthful label is annexed we contend that no conversations or writings of any one, even of the principal, can be admitted to vary or modify the label, and certainly the label cannot be modified by a mere verbal statement of a salesman.

This is not an action brought by the purchaser on the ground of fraud, nor a prosecution for defrauding a purchaser, yet such was the form in which it went to the jury. It is a prosecution which creates an offense unknown to the common law. The claim of the Government is based on the first subdivision of section 8 of the Food and Drugs Act, but it is submitted that this section, and particularly the latter part of it, must be read in conjunction with all the other subdivisions of section 8 and other sections of the act.

The other subdivisions of section 8 show by their repeated reference to the labels that it was the condition of the article when shipped that Congress had in mind.

It is submitted that the Food and Drugs Act is intended to apply only to the adulteration and misbranding of articles and to prevent their "introduction into any State or Territory." It does not purport, nor do the debates in Congress even intimate, that under this act the contracts and correspondence of the persons engaged in interstate commerce were to be considered in determining as to whether or not there was a violation of the act. This is shown by sections 3 and 4 of the act, which provide for the examination of foods and drugs, not for an examination of the books or papers of the shipper or consignee. The goods and the label are made the test. Throughout the debates in Congress the entire section 8 was considered as one section, and the recent cases in the United States Supreme Court show the intent and purpose of the act (McDermott *vs.* State of Wisconsin, 228 U. S., 115).

That the wording of the label controls, see Nave McCord *vs.* United States, 182 Fed., 46-48 (C. C. A., 8th Cir.), U. S. *vs.* One Carload of Corno H. & M. Feed, 188 Fed.,

453. That the provisos limit the entire section, see United States *vs.* 68 Cases of Syrup, 172 Fed., 781.

Prior to the amendment of 1912 even a circular enclosed in a package could not be considered. U. S. *vs.* American Druggists' Syndicate, 186 Fed., 387. That amendment enlarged the scope of the statute to include a circular, but, surely, if before that not even a circular could be considered and an amendment was required to allow it, *now* it cannot be contended that an oral statement of a *drummer soliciting an order* can be taken into account. If so, every person manufacturing foods and drugs is at the mercy of the drummers who solicit orders and the salesmen who sell his goods over the counter if he employs such. And this in spite of the fact that he may have labeled his goods properly and done all in his power to avoid any deception. The appellant here is in just that situation. He labeled the goods properly—the court below admits it—and he instructed his salesman not to misrepresent but to sell things for what they were. It is not charged that he was negligent in choosing his agents. Yet he is to be held for the act of one of those agents, an act which was in disobedience of that agent's instructions and contrary to his duty to his principal. Such a holding will have a serious and far-reaching effect upon the means of doing business. It will curtail the use of salesmen—the penalty imposed is too great. *The manufacturer can never feel secure, he can never know—no matter how carefully he has labeled his product—when he may be guilty of an offense against the United States. If every puffing statement of a too-eager and too-zealous salesman is to alter the label on the goods the manufacturers can never be safe from the fears of prosecution.*

To carry the doctrine contended for by the United States to its logical end, if a properly labeled article can be misbranded by the statement of a salesman, then it must follow that if an article be misbranded the fault in the label can be cured by the statements of a salesman that the label is false

and incorrect and by his stating what the article really is. Where, then, is the protection to the public that the act seeks? The article is not misbranded, for the label, coupled with the statements of the drummer, tells the complete truth about it. Yet there it stands on the merchants' shelves, with a label that alone is false and misleading. On the other hand, we have an article that is properly labeled, whose label is plain, so that all who see it on the merchants' shelves may know it for what it is. And we are told that it is misbranded because the label is contradicted by what the salesman said when he was trying to sell it. Where is the protection to the public in the first situation and where is the harm in the second? In other words, what becomes of the purpose of the act under these circumstances? The court must look at the act as a whole and consider its purpose in interpreting it.

This court has said in McDermott *vs.* Wisconsin, 228 U. S., 115, at page 128:

> "The food and drugs act was passed by Congress, under its authority to exclude from interstate commerce impure and adulterated food and drugs, and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed. Hipolite Egg Co. *vs.* U. S., *supra.*"
>
> See also Hipolite Egg Co. *vs.* U. S., 220 U. S., 45.

Point II.

IN ANY CASE THE JUDGMENT SHOULD BE REVERSED, FOR A REPRESENTATION BY A SALESMAN IS NOT BINDING UPON THE PRINCIPAL IN A CRIMINAL ACTION WITHOUT PROOF OF ACTUAL AUTHORITY.

Whatever may be the decision of the court upon the point just presented, it is submitted that the statements of the salesman Fink—if, indeed, they were ever made, in view of his testimony that he was told not to misrepresent goods (Record, p. 8, fol. 42), and that he never told Lewis the Special Lemon was lemon oil (Record, p. 8, fol. 43)—these statements, we submit, are not binding upon the principal, the defendant, in order to convict him of misbranding within the purview of the act.

The court below sustained the conviction on the second count charging a misbranding by offering for sale under the distinctive name of another article. This offering for sale was found to be through the act of Fink in stating that the goods were pure lemon oil.

It is respectfully called to the court's attention that this action is a criminal prosecution for an alleged offense against the United States, and it is submitted that in such an action the act of an agent, not authorized or ratified by the principal and in no way participated in by him, cannot bind that principal and make him guilty of a crime.

In Schreiber *vs.* Sharpless, 6 Fed., 175, it was held that in a criminal action a principal was not responsible for acts of an agent done without the principal's knowledge. The same rule was followed in Taylor *vs.* Gilman, 24 Fed., 632.

McDonald *vs.* Hearst, 95 Fed., 656, was an action to recover penalties inflicted by statute for the violation of a copyright. The court considered the action to be in its nature criminal. The act had been done by an agent of the defendant without the latter's knowledge or assent. The

court, after stating the rule as to liability in civil actions for an act of an agent, said, at page 657:

> "But, according to the best-reasoned cases, when the wrongful act of the servant, although committed in the performance of duties imposed by his employment, was done without the authority, knowledge, or approval of the master the rule just stated is not broad enough to render the latter liable for punitive damages on account of such act of his servant, in the absence of gross negligence in the employment, or in the retention of the servant after knowledge of his unfitness or incompetency; that is, under such circumstances there can be no recovery against the master of damages which the law visits upon the wrongdoer by way of punishment only, and not for the purpose of compensating the injured party for the damage in fact sustained by him. Cleghorn *vs.* R. R. Co., 56 N. Y., 44; Post Co. *vs.* McArthur, 16 Mich., 447; Turner *vs.* R. R. Co., 34 Cal., 594; Warner *vs.* Pacific Co., 113 Cal., 105; 45 Pac., 187; Ry. Co. *vs.* Prentice, 147 N. S., 101; 13 Sup. Ct., 261."

Not only has it been held in criminal cases that the master has been held not liable for an act of his servant, not authorized, ratified, or participated in by him, but even in civil cases under those circumstances the courts have refused to allow *punitive damages by way of punishment* to be recovered against the master, although he has been held liable to compensate the injured party. In addition to the cases cited in McDonald *vs.* Hearst, *supra*, see Norfolk & P. Traction Co. *vs.* Miller, 174 Fed., 607; Pacific Packing & Nav. Co. *vs.* Fielding, 136 Fed., 577; Toledo, St. L. & W. Ry. Co. *vs.* Gordon, 143 Fed., 95; Kercheral *vs.* Allen, 220 Fed., 262; Maisenbacher *vs.* Society Concordia, 42 Atl., 67 (Conn., 1899).

In all of these cases the courts have refused to allow a master to be punished, even under the name of damages, for a wrongful act of a servant which the master did not author-

ize, participate in, or ratify. The principal in the case at bar is in the same situation as the master in these cases. His servant has committed a wrongful act; the master neither authorized, participated in, nor ratified it. He never knew of it until the story was told on the witness stand. He had expressly forbidden the servant to do the act; he had taken all the precautions that he could reasonably be expected to. Under the principle of the cases he should not, then, be punished for the act of his servant.

Commonwealth *vs.* Nichols, 51 Mass., 259, was a prosecution for an illegal sale of liquor. After stating the rule in civil cases the court said, at page 260: "As a general rule, something beyond this is necessary to charge the master criminally for acts done by the servant. There must be such a direct participation in the act, or such assent and concurrence therein, as would involve him morally in the guilt of the action." The court held that liquor cases were an exception to the general rule just quoted, and that the master would ordinarily be liable for the act of the servant, but said, at page 263: "But if a sale of liquor is made by the servant without the knowledge of the master, and really in opposition to his will, and in no way participated in, approved, or countenanced by him, and this is clearly shown by the master, he ought to be acquitted." As the instruction given did not meet the requirements of this last quotation, a new trial was granted.

Commonwealth *vs.* Riley, 210 Mass., 387, was a criminal action for a violation of the statute as to hours of work for women. The defendant was the superintendent of the mill, and evidence showed an overseer permitted the woman to go to work early. The court said (page 396):

> "The concession by the defendant that as superintendent of the Davol Mills he had general charge of the operations of the mill, and that the overseers were subject to his orders, could have been found to make the defendant as responsible for the act of an overseer in permitting or consenting to the work of

> Nora Callahan as he would have been if himself the employer. This means that he might have been found guilty, even though ignorant of the specific act in question. *But he could have been held liable for such an act by one of his overseers only if he participated in the prohibited act, or authorized, approved, or countenanced it in such a way as to assume initial responsibility for it.*" (Italics ours.)

The cases relied upon by the Solicitor General as supporting the proposition that the principal in this case is bound by the statements of his agent are all distinguishable from the present case. In U. S. *vs.* Gooding, 12 Wheat., 460, much relied upon in the court below, it was held that statements of a captain of a ship, made at the time he was negotiating for the services of a mate and in relation to the purposes of the voyage, were admissible in evidence against the owner as part of the *res gestæ*. That is very different from what it is sought to do in the case at bar—namely, to render the principal guilty of a crime because of an act of his agent in making a false statement. The statement is not being used as evidence; it is being used as an act which is claimed to be the act of the principal, and so to make him guilty of the commission of a crime.

McIntyre *vs.* Pryor, 173 U. S., 38, and Haskell *vs.* Starbird, 152 Mass., 117, are both civil cases in which the principal was held liable to respond in damages to *compensate* loss caused by the wrongful act of his agent. As we have already shown, the rule in criminal actions and also in civil actions for punitive damages is different from the rule in actions such as the above cases.

Groff *vs.* State, 171 Ind., 547; 85 N. E., 769, relied upon by the Solicitor General, is a case where the principal was held liable for the act of his servant in selling oleomargarine for butter in violation of a State statute. The doctrine of this case is not generally followed, but is limited even in Indiana to the facts of the case.

In Boos *vs.* State, 105 N. E., 117 (Ind., 1914) the court

held that a principal would not be liable for a sale of liquor made by his agent and unauthorized by the principal. As to the Groff case, the court had this to say (page 122):

> "In the latter, the conviction was not for selling oleomargarine, but in substituting it for dairy butter, which was called for by the purchaser, and it was the substitution which was interdicted by the statute. The proprietor had oleomargarine for sale and his agent was authorized to sell it, and it was held that criminal responsibility rested upon him for the unlawful substitution."

In the present case it is neither the sale nor the substitution of one article for another that is involved. The purchaser ordered "Special Lemon" and he got "Special Lemon." Nothing was substituted for what he ordered. The conviction is for *misbranding* by offering for sale under the name of another article, which is a different proposition from that in the above case. The general rule in criminal actions should apply and the unauthorized act of the agent should not bind the principal.

In cases of actual shipments of goods the master is held liable for the acts of the servant shipping and labeling same, because of the wording of section 12 of the Food and Drugs Act.

It is held that the master must know what he is shipping and how it is labeled—and that he is responsible if he allows others to do this work for him as by a servant and the latter fails to obey the law—such acts of an agent being, in the words of the act, "within the scope of his employment or office."

Here the master provided proper labels, and shipped or "introduced" properly labeled goods—can it be said that it was "within the scope of the employment" of this drummer to alter by oral statements the labels on goods? Yet that is just what the court has held he was authorized to do—in the

face of positive and uncontradicted testimony to the contrary (Record, p. 8, fol. 42; p. 13, fols. 72, 73).

Under the decision of the learned court below the "offering for sale under the distinctive name of another article" is an offense against the United States. It is the offering—not the selling or the shipping in interstate commerce.

In other words, if a manufacturer's salesman offers for sale in a State an article—whether it ever be shipped in interstate commerce or not, and whether he states that it ever will be so shipped or not—an offense is committed under the Food and Drugs Act.

This is to say, that when the article is *offered* for sale the offense is complete, quite regardless of whether the article is supplied from a stock kept within the State or whether it is supplied through the agencies of interstate commerce, or *whether it is ever shipped at all.*

More than this, at the time the offense was complete, no one could tell what the principal would do. Suppose he shipped the article that his salesman represented the sample to be. Can it be contended that then there would be an offense? Yet such must be the result if the offense is complete upon the offering for sale. Suppose the manufacturer shipped neither the article represented nor the article from which the sample was taken, but another article properly labeled. Is there then an offense against the Food and Drugs Act?

If the act is to be construed as it was below it must be held to be unconstitutional. An offering for sale, pure and simple, and alone by itself, is a State transaction and with it interstate commerce has nothing to do and in regard to it Congress has no power to legislate. Congress can only regulate commerce between the States; it cannot touch commerce within a State. Yet the law as interpreted by the court below allows Congress to do this prohibited thing—to regulate an internal affair of a State under the guise of its interstate commerce power.

It has been held that a mere drummer or solicitor of orders, such as Fink here was, has not even the authority to make an absolute contract of sale, but can merely solicit orders and transmit them to his principal for satisfaction or rejection, and that no contract of sale is made until the ratification.

In John Matthews Co. *vs.* Renz, 61 S. W., 9 (Ky., 1901), at page 10, the court said:

> "The undisputed facts are that Russell, the traveling salesman of appellant, was a 'drummer'—a term that has come to have a fixed and proper place in our language as well as in our law. That this transaction was the usual taking of an order by the drummer, and transmitting it to his 'house' for action—approval or rejection. The custom of so doing business is of such long standing, so extensive, and so important in the commercial world, especially in the United States, that the courts will take notice of it. They have done so, and this court has, in Grocery Co. *vs.* Becket, 57 S. W., 458, recognized in this State what appears to be the general rule in most or all of the States, quoting it in this language: 'In the absence of special authority to bind his principal, the drummer can merely solicit and transmit the order, and the contract of sale does not become completed until the order is accepted by his principal.' Any other construction of those transactions would tend to so materially hamper and cripple this important means of conducting mercantile business as to well-nigh destroy its effectiveness, now so generally understood, employed and recognized."

The court, in Grocery Co. *vs.* Beckett, 57 S. W., 458 (Ky., 1900), referred to above, saying this:

> "The general rule in regard to the authority of commercial travelers is thus stated in 6 Am. & Eng. Enc. Law (2d ed.), p. 227: 'In the absence of special authority to bind his principal, the drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by his principal.' It has been held that,

> when the purchaser completes his transactions with the drummer, no binding contract has been made, nor any sale, absolute or conditional; that the purchaser may countermand his order at any time before the goods are shipped, or the house may refuse to accept the order; that it is a mere proposal, to be accepted or not as the house may see fit, and may be withdrawn by the purchaser at any time before final acceptance. McKindly *vs.* Dunham, 55 Wis., 515; 13 N. W., 485; Bensberg *vs.* Harris, 46 Mo. App., 404."

See also

> Lindow *vs.* Cohn, 90 Pac., 485, 486 (Cal., 1907).
> Clough *vs.* Whitcomb, 105 Mass., 482.
> McKeige *vs.* Carroll, 120 N. Y. App. Div., 521, 524.
> Cafre *vs.* Lockwood, 22 N. Y. App. Div., 11.

Yet it is on the statement of such a person, unauthorized to even make a contract of sale, let alone to sell goods, that the principal in this case is to be convicted of the crime of misbranding by offering for sale. Indeed, if the principle of the above cases be followed out to its logical end the salesman makes no offer; the offer comes from the person ordering the goods. How else could the "house" have the right to accept or reject and how else could there be no contract of sale until the "house" accepts? If the salesman makes no offer, then his act could by no possibility misbrand the goods by "offering for sale under the distinctive name of another article."

But the statement of a person of such exceedingly limited authority should not be allowed in this criminal action to make the principal guilty of a crime against the United States.

Not only was the statement not an *act* within the scope of the drummer's authority, but actually there was no offering by the drummer of the product which was introduced

into interstate commerce—the drummer could not make an *offer*—he could only take an order.

The goods tested and tried were those shipped in interstate commerce—not the vial containing a liquid about which the salesman made statements. The only goods introduced in interstate commerce—the only goods really offered—were the properly labeled goods of defendant. The substance was a special one—and was "offered," *i. e.*, introduced into interstate commerce—under its own proper name and own proper label, which label did not bear the distinctive name of any other article and which label is conclusive on the subject here before us.

The Foods and Drugs Act should not be destroyed by forced construction, but should be made a workable and enforcible act by holding manufacturers strictly to their labels—and not permitting those labels to be varied by oral statements—thus affording protection not only to the manufacturers and jobbers but to the public, who rely, and should rely, on the labels alone.

Lastly.

THE DECISION OF THE CIRCUIT COURT OF APPEALS, SECOND CIRCUIT, SHOULD BE REVERSED.

WALTER JEFFREYS CARLIN,
Counsel for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

OSCAR J. WEEKS, DOING BUSINESS UNDER the name of O. J. Weeks & Co., petitioner,
v.
THE UNITED STATES.
No. 109.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

It is not now necessary to repeat the argument contained in the brief filed for the United States in opposition to the petition for certiorari. We submit that brief as a reply to the brief for the petitioner.

There is, however, an additional reason why the judgment should be affirmed.

The product bearing the label "Special lemon—Lemon Terpene and Citral" was not a product derived from lemon. But the Circuit Court of Appeals held that the use of this label was not a misbranding within the meaning of the law. However, the jury had found, upon ample evidence, that

31230—17

it was in fact offered for sale and sold as lemon oil, a product derived from lemon. This, the court held, was a violation of the provision of the law that an article should be deemed to be misbranded—

> If it be an imitation of or offered for sale under the distinctive name of another article.

It is true the offer of sale was made by a traveling salesman and that the Circuit Court of Appeals, in affirming the judgment of the District Court, said:

> Since intent is not an element of the offense, defendant must be held liable for the act of his sales agent, although he had told him not to misdescribe the article. 224 Fed., 64, 68.

But, to affirm the judgment, it was not necessary to go that far. The district judge had taken a different view of the law and, referring to the representations made by the salesman, had instructed the jury:

> I will, however, tell the jury that they must remember that while that testimony is admissible, it is only binding on the defendant, provided they are satisfied beyond a reasonable doubt that they were made by his authority and direction. In other words, to hold a principal liable in a criminal action, you must be satisfied that the representation was made by his authority. Rec., p. 20.

The petitioner, then, was convicted because the jury believed he had authorized the offer of sale,

which amounted to a misbranding within the meaning of the law.

The only question, then, is whether there is any evidence to support the verdict of the jury on this point. While there was no witness who testified directly to the giving of authority to sell the article in question as a product of lemon, the testimony of the petitioner and his salesman, when properly weighed, is fully sufficient to justify the verdict. The salesman, it is true, says that he was instructed "not to sell this as *pure* lemon oil" (R., p. 8). But he does not say that he was not to sell it as any other kind of *lemon oil*, and throughout his testimony he speaks of it as a product as good as the best brands of lemon oil. The petitioner himself shows that it was intended for the same use that is made of lemon oil and speaks of it "as compared with *pure* lemon oil." He says he was selling it "against the *pure* lemon oil." Again, "pure lemon oil is not special, it is regular." He distinguishes it, as to price, from *pure* lemon oil. He does not say that his salesman was not authorized to sell it as "lemon oil" (R., pp. 12 and 13). His testimony, as a whole, shows that he drew a distinction between this product and *pure* lemon oil, but not between it and cheaper grades of lemon oil. A reading of the evidence fully warrants the conclusion that the salesman was authorized to offer this product for sale as a lemon oil—a product of lemon—though perhaps he was not to claim that it was *pure*. Hence, whether the

Circuit Court of Appeals was right in its conclusion that petitioner could be held criminally liable for an unauthorized act of his salesman or not, the judgment must be affirmed.

Respectfully submitted.

WILLIAM L. FRIERSON,
Assistant Attorney General.

DECEMBER, 1917.

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16